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IN THE

Supreme Court of the United States

WILLIAM DWIGHT LANDRENEAU,
Secretary for the Louisiana Department
of Wildlife and Fisheries,

Petitioner,

v.

PELTS & SKINS, LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether La.R.S. 56: 253 and 279 violate the First Amendment insofar as they require alligator hunters and alligator farmers in Louisiana to pay assessments to fund generic marketing with which they disagree.

LIST OF PARTIES

The plaintiff-appellee in the Fifth Circuit Court of Appeals was Pelts & Skins, L.L.C., a Louisiana limited liability company. The original defendant-appellant was James A. Jenkins, Jr., Secretary of the Louisiana Department of Wildlife and Fisheries. William Dwight Landreneau, the current Secretary of the Louisiana Department of Wildlife and Fisheries, was substituted in the Court of Appeals in the place of Mr. Jenkins on January 22, 2004.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	x
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Petition	13
I. Generic alligator marketing by the Louisiana Department of Wildlife and Fisheries is government speech which is exempt from First Amendment scrutiny	15
A. The First Amendment permits a state to engage in its own speech and to assess its citizens, or a segment of its citizens, to pay for that speech	16

Contents

Page

B. Louisiana's alligator marketing program is government speech because the state specified the message, created a governmental entity to disseminate it, and vested control in a politically accountable official 17

C. The Court of Appeals incorrectly found that the speech in question is not government speech 21

D. The question whether Louisiana's alligator marketing program involves government speech warrants the Court's consideration 23

II. Louisiana's assessments are constitutional under the intermediate scrutiny applicable to regulations of commercial speech 25

III. Louisiana's alligator marketing program is part of a broader regulatory scheme that exempts this program from the First Amendment 27

Conclusion 30

TABLE OF CITED AUTHORITIES

Page

Cases:

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 17, 29

Board of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000) 17, 18, 21, 22

Board of Trustees v. Fox, 492 U.S. 469 (1989) 25

Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980) 13, 14, 15, 25, 26

Charter v. United States Dept. of Agriculture, 230 F. Supp. 2d 1121 (D. Mont. 2002), *appeal pending*, No. 02-36140 (9th Cir.) 4

Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Committee, 412 U.S. 94 (1973) 16

Cox v. New Hampshire, 312 U.S. 569 (1941) 23

Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457 (1997) ..... *passim*

In re R.M.J., 455 U.S. 191 (1982) 26

Kadrmas v. Dickinson Public Schools, 487 U.S. 450 (1988) 23

Cited Authorities

Page

Keller v. State Bar of California, 496 U.S. 1 (1990) 17, 21, 29

Lebron v. National R.R. Passenger Corp., 513 U.S. 374 (1995) 19, 20

Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001) 16, 18

Livestock Marketing Ass'n v. U.S. Dept. of Agriculture, 335 F.3d 711 (8th Cir. 2003), *cert. granted in part sub nom. Veneman v. Livestock Marketing Ass'n* (May 24, 2004) (No. 03-1164) ..... *passim*

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) 26

Michigan Pork Producers Ass'n v. Veneman, 348 F.3d 157 (6th Cir. 2003), *petition for cert. filed sub nom. Michigan Pork Producers Ass'n v. Campaign for Family Farms* (Jan. 20, 2004) (No. 03-1043) ..... *passim*

National Endowment for the Arts v. Finley, 524 U.S. 569 (1998) 16

Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819 (1995) 4, 16

Rust v. Sullivan, 500 U.S. 173 (1991) 16

Cited Authorities

	Page
Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000)	18
United States v. Frame, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990)	5, 24
United States v. Sperry Corp., 493 U.S. 52 (1989)	22
United States v. United Foods, Inc., 533 U.S. 405 (2001)	*passim*
United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981)	23
West Va. Bd. of Education v. Barnette, 319 U.S. 624 (1943)	28
Wooley v. Maynard, 430 U.S. 705 (1977)	28
Codes:	
7 U.S.C. § 601 *et seq.*	27
7 U.S.C. § 6101 *et seq.*	29
28 U.S.C. § 1254(1)	1
50 C.F.R. § 17	6
La. Civ. Code art. 3413	5
La. Admin. Code Title 76, Ch.7, § 701	7, 8

Cited Authorities

Page

Constitution:

U.S. Const., Amend. I ..... *passim*

Statutes:

16 U.S.C. § 1531 *et seq.* 6

16 U.S.C. § 1537a 6

16 U.S.C. § 1538(c)(1) 7

P.L. 89-669, 80 Stat. 926 6

La.R.S. 56:3A 5

La.R.S. 56:251 8

La.R.S. 56:253 ..... *passim*

La.R.S. 56:259 7

La.R.S. 56:262 8

La.R.S. 56:266 .....1, 10, 19, 20

La.R.S. 56:279 ..... *passim*

Miscellaneous:

28 La. Register 1874 .....10, 19

Cited Authorities

Page

Treaties:

Convention of International Trade in Endangered Species of Wild Fauna and Flora, 27 U.S.T. 1087, T.I.A.S. No. 8249 6

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Fifth Circuit Filed April 2, 2004 ..... 1a

Appendix B — Findings Of Fact And Conclusions Of Law Of The United States District Court For The Middle District Of Louisiana Dated And Filed April 24, 2003 ..... 24a

Appendix C — Relevant Statutes 50a

William Dwight Landreneau, Secretary of the Louisiana Department of Wildlife and Fisheries, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (App. A at 1a-23a) is reported at *Pelts & Skins, LLC v. Landreneau*, 365 F.3d 423 (5th Cir. 2004). The opinion of the district court (App. B at 24a-49a) is reported at *Pelts & Skins, L.L.C. v. Jenkins*, 259 F. Supp. 2d 482 (M.D. La. 2003).

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The judgment of the Fifth Circuit was entered April 2, 2004. Neither party requested rehearing in the Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides in pertinent part:

"Congress shall make no law . . . abridging the freedom of speech."

2. La.R.S. 56:253 is reproduced in pertinent part at App. C at 50a.

3. La.R.S. 56:266 is reproduced in pertinent part at App. C at 50a-52a.

4. La.R.S. 56:279 is reproduced in pertinent part at App. C at 52a-56a.

STATEMENT OF THE CASE

This case presents a First Amendment challenge to the mandatory assessment by the Louisiana Department of Wildlife and Fisheries (the Department) of certain fees on alligator farmers and alligator hunters to fund generic marketing, research, and industry and consumer information about Louisiana alligators. The Fifth Circuit held in this case that the assessment violated the First Amendment rights of a Louisiana alligator farming operation that objected to funding part of the cost of such marketing.

On two prior occasions, the Court has granted review of decisions declaring unconstitutional assessments under similar regulatory programs. In *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 477 (1997), the Court held that mandatory assessments to fund generic advertising under a marketing program for California tree fruit survived First Amendment scrutiny as "a species of economic regulation." Conversely, in *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), this Court (over the dissents of Justices O'Connor, Ginsburg, and Breyer) held that mandatory assessments to fund generic advertising of mushrooms failed to pass muster under the First Amendment.

Both the Eighth Circuit and the Sixth Circuit recently upheld First Amendment challenges to generic marketing programs in *Livestock Marketing Ass'n v. U.S. Dept. of Agriculture*, 335 F.3d 711 (8th Cir. 2003), *cert. granted in part sub nom. Veneman v. Livestock Marketing Ass'n*, (May 24, 2004) (No. 03-1164), and in *Michigan Pork Producers Ass'n v. Veneman*, 348 F.3d 157 (6th Cir. 2003), *petition for cert. filed sub nom. Michigan Pork Producers Ass'n, Inc. v. Campaign for Family Farms* (Jan. 20, 2004) (No. 03-1043). The Eighth Circuit case, *Livestock Marketing*, involved assessments for generic marketing of beef;

the Sixth Circuit case, *Michigan Pork*, challenged assessments for generic marketing of pork.

On May 24, 2004, this Court granted the petition for a writ of certiorari in the *Livestock Marketing* case, and in the case consolidated with it in the Eighth Circuit, *Nebraska Cattlemen, Inc. v. Livestock Marketing Ass'n*, 335 F.3d 711 (8th Cir. 2003), limited to the following issues:

From the *Livestock Marketing* case:

> Whether the Beef Promotion and Research Act of 1985 (Beef Act), 7 U.S.C. 2901 *et seq.*, and the implementing Beef Promotion and Research Order (Beef Order), 7 C.F.R. Part 1260, violate the First Amendment insofar as they require cattle producers to pay assessments to fund generic advertising with which they disagree.

From the *Nebraska Cattlemen* case:

> Whether the Eighth Circuit erred in holding that the Beef Promotion and Research Act of 1985 ("Beef Act"), 7 U.S.C. §§ 2901 *et seq.*, and regulations promulgated thereunder — which impose assessments on beef producers and importers to fund research, education, and promotional activities carried out by special administrative bodies created by Congress for the express purpose of furthering important governmental objectives under the direct supervision and control of the Secretary of Agriculture — are "unconstitutional and unenforceable."

The petition in the *Michigan Pork* case, filed January 20, 2004, is pending as of the time of filing this petition.

In this case, the Fifth Circuit decided the same constitutional issue addressed by the Eighth Circuit in *Livestock Marketing* and by the Sixth Circuit in *Michigan Pork.*[1] The government defendant in each of these cases raised as a defense the government speech doctrine, an issue that the Court has never decided in the context of compelled subsidies for generic marketing. (In the *United Foods* case, this Court specifically declined to consider the issue because the argument had not been raised below. 533 U.S. at 416-17.) The government speech doctrine is based on the principle that "when [the government] is the speaker or when it enlists private entities to convey its own message . . . it is entitled to say what it wishes." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995). Although each of the circuit courts in these three cases upheld the First Amendment challenge to the government program involved, the decisions represent a conflict within the circuit courts on the government speech issue in the context of compelled subsidy cases.

The Eighth Circuit held categorically that the government speech doctrine does not apply to compelled subsidy cases. 335 F.3d at 720. In contrast, the Fifth Circuit held in this case that "the government speech doctrine is at least potentially applicable to this general category of cases." 365 F.3d at 429 n.13, App. A at 12a. The Eighth Circuit's decision is in tension

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1. The same constitutional issue is also pending before the Ninth Circuit in an appeal from a district court's decision finding that the Beef Act's generic marketing program constitutes government speech and is therefore exempt from First Amendment scrutiny. *Charter v. United States Dept. of Agriculture*, 230 F. Supp. 2d 1121 (D. Mon. 2002). Following oral argument and submission of the case in the Ninth Circuit, that court vacated the submission on May 27, 2004, pending this Court's resolution of the identical issue posed in the *Livestock Marketing* case, which will be heard by this Court next term. 9th Cir. docket sheet for No. 02-36140, 5/27/04 entry.

with not only the Fifth Circuit's decision in this case, but with both the Sixth Circuit's decision in the *Michigan Pork* case and the Third Circuit's less-recent decision in *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990). In both the *Michigan Pork* and *Frame* cases, the circuit courts assumed that, if the compelled subsidy program qualified as government speech, producers would have no First Amendment right to avoid assessments for those programs.

Statutory and Regulatory Background. Louisiana has one of the largest remaining wetland areas in America, with over four million acres of marsh, swamp, and other wetland habitat for alligators and other animals. Over 1.5 million alligators live in these four million acres. Although much of this land is privately owned, the wild alligators who inhabit these wetlands belong to the state, La. Civ. Code art. 3413, and are under the jurisdiction of the Department. La.R.S. 56:3.A. But these fearsome nongame quadrupeds have not always roamed Louisiana's wetlands in such vast numbers.

At the turn of the last century, the state was home to almost the same number of wild alligators as today. But over the following decades, the number of wild alligators in the state declined to a point near extinction. Beginning in the 1960s, both the state and federal governments began taking steps to protect endangered species. Due to the coordinated federal and state regulatory scheme — now enforced worldwide through a treaty signed by over 160 nations — Louisiana's alligator population has not only come back from the brink of extinction, it has grown large enough to support a statewide industry with an annual economic impact of more than $54 million.

But the state's alligator industry has been threatened by market dynamics not unrelated to the rebound of the alligator population, including the worldwide animal rights movement.

As part of its comprehensive regulation of the alligator industry, the Louisiana legislature has addressed this threat and other market issues through education and marketing programs. It is the funding of these marketing programs that is at issue in this case.

Congress' first step in the conservation effort came with passage of the Endangered Species Preservation Act of 1966, P.L. 89-669, 80 Stat. 926. That law provided for a listing of certain native animal species as endangered and established limited means for protecting listed species.[2] The following year, the *Alligator Mississippiensis* or "American Alligator" was placed on the endangered species list. 50 C.F.R. § 17, App. D (1971). Louisiana's 1.5 million alligators are members of the American Alligator species.

In 1973, the United States, along with other countries, signed the Convention of International Trade in Endangered Species of Wild Fauna and Flora (CITES), Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249. The treaty, which has been signed by over 160 countries in the three decades since its enactment, restricts international commerce in wild animals and plants that are believed to be actually or potentially harmed by trade.

The treaty classifies covered species in three categories according to their relative need for protection, and placed the American Alligator in the middle category with other species that are not necessarily now threatened with extinction but may become so unless trade is closely controlled. CITES, Art. II. The United States implemented CITES through the Endangered Species Act, 16 U.S.C. § 1537a.

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2. The Endangered Species Act of 1973, 16 U.S.C. § 1531 *et seq.*, superceded both the Endangered Species Preservation Act of 1966 and the Endangered Species Conservation Act of 1969.

The Endangered Species Act makes it unlawful for any person subject to U.S. jurisdiction to engage in any trade contrary to CITES, or to possess any specimens traded contrary to the treaty. 16 U.S.C. § 1538(c)(1).

Louisiana's efforts to rebuild its alligator population began in earnest in the 1960s through research, management and law enforcement. In 1962, the state closed its alligator hunting season and began a concentrated effort to manage this valuable resource. After a ten-year hiatus, Louisiana reestablished its annual alligator harvest on a limited basis. In 1970, the Legislature gave the Department full authority to regulate alligators in the state. In 1972, Louisiana initiated its first program aimed at managing the wild alligator population based a sustained-yield harvest. The first hunt, authorized in 1972, was confined to one parish in southwestern Louisiana. The hunt area was gradually expanded until 1981, when the season was opened statewide.

Between 1972 and 2001, Louisiana's wild alligator harvest produced almost 500,000 wild skins with an estimated value of $168 million. This renaissance of the alligator population and industry was made possible by state and federal regulation of the industry. In 1987, the American Alligator was removed from the Endangered Species List due to recovery.

The Department oversees two alligator programs: the first based on a wild harvest strategy, the other based on farming of captive adult alligators and alligator eggs collected from the wild. The state regulates almost every aspect of these two programs.

Louisiana's hunting season for wild alligators takes place in September and lasts roughly a month. *See* La.R.S. 56:259.A; La. Admin. Code Title 76, Ch. 7, § 701 G.1. A hunter who wishes to take part in the wild alligator harvest season must obtain a

license from the Department. La.R.S. 56:251A(2)(a)(i). If the license is approved, the Department issues the hunter a license and one or more numbered tags. Each tag authorizes the hunter to trap one wild alligator. All unused tags must be returned to the Department within 15 days after the close of the season. *Id.*, La. Admin. Code Title 76, Ch.7, § 701.F.2.c. Through this tagging program, the Department monitors and controls the exact number of alligators killed in the wild each year, i.e., the supply of alligator skins on the market.

Once a licensed hunter captures an alligator, the state's tracking system for wild alligators kicks in. At this point, the hunter dispatches his quarry and either skins his catch that day or, more typically, sells it directly to a dealer. Once an alligator has been dispatched, the hunter must insert one of his tags into the last six inches of the animal's tail. La. Admin. Code Title 76, Ch.7, § 701.F.5.

As with alligator hunting, the alligator farming industry is heavily regulated. The Department's tracking system for farmed alligators begins with the harvest of eggs from the wild and continues through the time these eggs are hatched, the baby alligators are raised, slaughtered, and skinned, and the skins are shipped out of state. An alligator farmer who wishes to collect alligator eggs on private property must also obtain a license from the Department. La.R.S. 56:262B.

The egg collection license allows the farmer to collect his quota of alligator eggs, then incubate, hatch and raise them at his farm. At the end of his second year of egg collection, the farmer must return 14 percent of the hatch, each averaging at least 4' in length, to the original property. The returned animals are closely monitored by the Department, which measures each animal before it is returned, records its sex, numbers and tags it, and notches one of the ridges on its back for future reference.

When alligators skins are ready for shipment out of state, the dealer provides a shipping manifest to the Department. At this point the dealer — or in this case the respondent — pays the "tag fee" of $2 per skin. La.R.S. 56:253(C)(2)(a). These tag fees are credited to the Louisiana Alligator Resource Fund which pays for numerous programs, including generic marketing.

Louisiana's regulatory scheme not only resuscitated a species which had by 1962 become endangered by over-harvesting, but also facilitated the creation of a strong, stable market for this valuable resource. From 1972 through 2001, Louisiana's harvest of wild and farm alligators produced almost 2.2 million wild skins (over 2,000 miles of leather) with an estimated value of $317.6 million. Ninety percent of the farm harvest has occurred since 1990. But with the state's efforts to save and maintain its alligator population and develop an industry came other forces: the worldwide animal rights movement, along with markets that changed, but did not expand.

A relatively small percentage of products made from Louisiana alligator skins are consumed in the United States. Many potential buyers in this country still believe that alligators are endangered, and know nothing of the quality of the leather. Therefore, the Department determined that market enhancement programs were needed to increase demand and support stronger prices.

In 1991, the Louisiana Legislature created the Alligator Resource Fund. La.R.S. 56:279, App. C at 52a-53a. In the statute creating this fund, the Legislature recognized that the state's alligator industry is a vital aspect of its economic base, and that there is a need to educate the public concerning alligator hunting as a sound wildlife management practice and to support the industry with a comprehensive research and development

program. A portion of all Department revenues received from tag fees is credited to the Resource Fund. These monies may be spent only on authorized programs, including salaries within the Department's fur and refuge division; law enforcement activities associated with the alligator farm industry; marketing programs; research on alligator conservation and techniques for enhancing the industry; and management of the alligator population. La.R.S. 56:279B, App. C at 53a.

The Legislature also created a governmental entity — the Louisiana Fur and Alligator Advisory Council (Advisory Council) — within the Department. The Advisory Council is responsible for reviewing and approving recommended procedures and programs to be funded by the Alligator Resource Fund and another fund. The Secretary (or his designee) is an *ex officio* member of the Advisory Council and "shall be present at all official meetings." La.R.S. 56:266C, App. C at 51a. Moreover, one member of the Council is appointed by the speaker of the Louisiana House of Representatives and another by the president of the Louisiana Senate. The remaining nine members of the Council are appointed by the Secretary, and represent a cross section of trappers, alligator hunters, coastal landowners and alligator farmers. The Council reviews and approves programs and services implemented by the Department and *recommends* expenditures from the two funds to ensure that funds are dedicated solely to projects that further goals identified by the Legislature. The Department, not the Council, creates and controls its own budget.

The Legislature sets the tag fees which help fund the Alligator Resource Fund. R.S. 56:253, App. C at 50a. Such fees are not fixed or controlled by the Advisory Council, but are under the Department's administrative control. *See, e.g.*, 28 La. Register 1874. The Secretary exercises veto power over the Council's recommendations regarding expenditures from the

Fund, and the Department, not the Council, is responsible for annual reporting to the Legislature on the status and uses of fund revenues. La.R.S. 56:279E.

The legislative goals of public education, marketing, and resource management are interrelated and essential parts of Louisiana's comprehensive program directed at conservation and sustainable use of this valuable state resource. In the period since implementation of these measures, the Louisiana alligator industry has enjoyed substantial growth. The alligator farming industry has grown from only 30 farmers in 1987 to 66 in 2000, with over 500,000 animals in captivity.

Proceedings in the District Court. On April 16, 2002, Pelts & Skins, LLC filed this suit in the Middle District of Louisiana for injunctive relief against James A. Jenkins, Jr., then Secretary of the Louisiana Department of Wildlife and Fisheries. Plaintiff challenged as violative of the First Amendment expenditures for generic marketing from two separate funds controlled by the Department, one of which is the Alligator Resource Fund.[3] Plaintiff moved for a preliminary injunction, and the parties agreed that trial of the preliminary injunction would be combined with trial on the merits. Plaintiff moved for summary judgment, the Secretary opposed the motion, and the parties agreed to submission of the case on the record. District Judge John Parker heard oral argument on plaintiff's summary judgment motion, the parties filed exhibits into the record without objections, and the case was submitted on the merits without any live testimony. Thereafter, the district judge issued his Findings of Fact and Conclusions of Law, App. B at 25a-

3. Respondent also challenged generic marketing expenditures from the Louisiana Fur and Alligator Public Education and Marketing Fund. The Fifth Circuit held that respondent lacked standing to challenge expenditures from that fund. 365 F.3d at 428, App. A at 9a. That portion of the court of appeals's holding is not at issue in this petition.

49a, directing that a permanent injunction issue against the Secretary prohibiting expenditures from the two funds "for the purpose of generic alligator marketing." Judge Parker entered judgment May 9, 2003, which included a permanent injunction prohibiting state officials from "approving, authorizing or expending any revenue from the . . . Louisiana Alligator Resource Fund for the purpose of generic alligator marketing." Judgment, CA rec.exc. 3.

The district court found that the alligator marketing program was not government speech, citing three factors: (1) the advertising is funded not through general tax dollars, but through fees on what could be considered "a narrow segment of society with common interests and one not representative of the general population, App. B at 39a; (2) the lack of evidence that the Advisory Council "was created to participate in the state's general government, *id.*; and (3) the "close nexus between the alligator producers and the message funded." *Id.* The district court also held that the marketing program "amounts to unconstitutional compelled commercial speech." App. B at 40a.

The Fifth Circuit's Decision. On April 2, 2004, the Fifth Circuit issued its decision, App. A at 1a-23a, affirming the district court's injunction insofar as it enjoined use of the Alligator Resource Fund for generic alligator marketing. The circuit court also vacated and remanded (on standing grounds) the injunction insofar as it barred state officials from using the Louisiana Fur and Alligator Public Education and Marketing Fund to support generical alligator marketing.

The Fifth Circuit held that "the government speech doctrine is at least potentially applicable to this general category of cases," 365 F.3d at 429 n.13, App. A at 12a, but found that "the generic marketing at issue is not government speech, but government facilitation of the private speech of fur and alligator harvesters."

365 F.3d at 429, App. A at 12a. The Fifth Circuit's factual findings on this point are not supported by the record.

On the issue of whether the program is constitutional under the standard articulated by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), for regulation of commercial speech, the Fifth Circuit expressed "doubt" that the *Central Hudson* test applies. 365 F.3d at 434 n.21, App. A at 23a, but added that, in any event, Louisiana's program "burdens First Amendment speech more than necessary. Louisiana does not need to compel alligator harvesters to support generic marketing, but could simply fund generic marketing from its general tax revenues." *Id.*

REASONS FOR GRANTING THE PETITION

The Fifth Circuit has held unconstitutional provisions of Louisiana law designed to protect one of the state's once-endangered natural resources — the American Alligator — and the multi-million dollar industry that has grown up around it. That holding is incorrect, for the Louisiana law is not one "abridging the freedom of speech" under the First Amendment. The law promotes speech — by the government — through modest assessments on persons who voluntarily participate in the alligator industry.

Respondent breeds and sells the very product that Louisiana has chosen to promote in the law in question, and the law does not constrain respondent from communicating its own messages. Therefore, whether analyzed under the First Amendment standard applicable to programs of government speech, the standard applicable to regulations of commercial speech, or the two in combination, Louisiana's assessment does not abridge respondent's freedom of speech. Indeed, in the context of sustaining similar statutes against First Amendment challenge,

the government speech and intermediate scrutiny analysis are mutually reinforcing.

This Court should grant this petition in order to address the applicability to compelled subsidy cases of these two legal doctrines: the government speech doctrine and the intermediate First Amendment scrutiny under the standard articulated by this Court in *Central Hudson*.

1. The decision of the Fifth Circuit in this case on the applicability of the government speech doctrine to compelled subsidy cases conflicts with the Eighth Circuit's *Livestock Marketing* decision, which this Court has agreed to hear. The Fifth Circuit outlined the conflicting decisions of the two circuit courts as follows:

> The Eighth Circuit declared the government speech doctrine categorically inapplicable to compelled subsidy cases. *See Livestock Mktg. Ass'n v. U.S. Dep't of Agric.*, 335 F.3d 711, 720 (8th Cir. 2003), *petition for cert. filed sub. nom. Veneman v. Livestock Mktg. Ass'n*, 72 U.S.L.W. 3539 (U.S. Feb. 13, 2004) (No. 03-1164). The Supreme Court's treatment of compelled subsidy challenges convinces us that the government speech doctrine is at least potentially applicable to this general category of cases.

365 F.3d at 429 n.13, App. A at 12a

2. The Court has not decided how or if the *Central Hudson* test applies to compelled subsidy cases, see *United Foods*, 533 U.S. at 410, and the circuit courts are split on the issue. The Sixth Circuit in the *Michigan Pork* case refused to apply the test to a compelled subsidy for a pork marketing program; the Eighth Circuit in *Livestock Marketing* applied a version of the *Central Hudson* test that it adapted to "the particular

circumstances" of that case. 335 F.3d at 723. In this case, the Fifth Circuit expressed "doubt that the *Central Hudson* test applies, 365 F.3d at 434 n.21, App. A at 23a, but then chose "to leave this question open because even were we to apply the *Central Hudson* test, Louisiana's alligator marketing program would not pass it." *Id.*

3. In light of the conflicts and inconsistences among the circuits on both of these issues, this Court should either grant the petition in this case and hear it on the merits along with *Livestock Marketing/Nebraska Cattlemen*, or withhold ruling on the petition until the Court decides the merits of the those two consolidated cases. If the issue before the Court in *Livestock Marketing/Nebraska Cattlemen* is resolved in favor of those petitioners, the Court should grant this petition, vacate the Fifth Circuit's decision insofar as it affirmed the district court's injunction, and remand the Fifth Circuit's decision for reconsideration in light of *Livestock Marketing/Nebraska Cattlemen*.

I. Generic Alligator Marketing By The Louisiana Department Of Wildlife And Fisheries Is Government Speech Which Is Exempt From First Amendment Scrutiny.

Sections 253 and 279 of Title 56 of the Louisiana Revised Statutes establishes a program of government speech. The generic marketing of alligators under that program serves public purposes identified by the state, is confined to a message specified by the state, and is disseminated by a governmental entity created by the state and subject to the supervision of the Secretary of the Department. The First Amendment does not constrain a state government's ability to engage in its own speech, whether funded by general tax revenues or by "tag fees" assessed against those who benefit most from the speech and are members of an industry that the state has chosen to protect.

A. The First Amendment Permits A State to Engage In Its Own Speech And To Assess Its Citizens, Or A Segment Of Its Citizens, To Pay For That Speech.

The First Amendment limits the government's interference with private speech rather than the government's own speech. Therefore, "when the State is the speaker, it may make content-based choices . . . [and] it is entitled to say what it wishes." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995); *see Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 139 n.7 (1973) (Stewart, J., concurring) ("Government is not restrained by the First Amendment from controlling its own expression.").

The First Amendment does not apply to government speech when the government is itself the speaker, as well as when the government "disburses public funds to private entities to convey a governmental message." *Rosenberger*, 515 U.S. at 833. In *Rust v. Sullivan*, 500 U.S. 173, 192-93 (1991), for instance, this Court upheld regulations prohibiting private physicians from providing abortion counseling as part of family planning counseling financed by federal funds. Although "*Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech," subsequent cases "have explained *Rust* on this understanding." *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541 (2001); *see National Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring) (It "makes not a bit of difference, insofar as either common sense or the Constitution is concerned, whether [government] officials further their (and, in a democracy, our) favored point of view by achieving it directly . . . or by advocating it officially . . . or by giving money to others who achieve or advocate it.").

Government speech necessarily is paid for by citizens, some of whom may disagree with its message. But such disagreement provides no basis under the First Amendment to silence the government or to excuse objecting citizens from having to share the costs of its speech. This Court has recognized that the government, "as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties," even when the government will spend the funds so raised "for speech and other expression to advocate and defend its own policies." *Board of Regents of Univ. Of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000). Indeed, if

> every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.

Keller v. State Bar of California, 496 U.S. 1, 12-13 (1990); *cf. Abood v. Detroit Bd. of Education*, 431 U.S. 209, 259 n.13 (1977) (Powell, Jr., concurring in the judgment) ("Compelled support of a private association is fundamentally different from compelled support of government.").

B. Louisiana's Alligator Marketing Program Is Government Speech Because The State Specified The Message, Created A Governmental Entity To Disseminate It, And Vested Control In A Politically Accountable Official.

The Court has not defined the precise contours of the government speech doctrine. But the Court's decisions suggest that, when the government establishes a program to convey a specific message, in order to advance a public purpose and

retains ultimate editorial control over the message, the program is one of government speech. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 303 (2000) (holding that an invocation delivered at school events by a student selected in a school election was government speech under the Establishment Clause because the invocation was "subject to particular regulations that confine the content and topic of the student's message"); *Velazquez*, 531 U.S. at 542 (contrasting a program designed "to promote a governmental message" with one designed "to facilitate private speech" on an array of topics); *Southworth*, 529 U.S. at 229 (suggesting that, if a state university established a program "to advance a particular message" of its own and remained "responsible for its content," the program would involve government speech). And, although the government may choose to convey a message through private parties, it may be particularly evident that a program involves government speech when the speaker is itself a government entity. Applying those principles, Louisiana's alligator marketing program is government speech.

First, in 1991, the Legislature created the Alligator Resource Fund, La.R.S. 279A, App. C at 52a-53a, and specified that the Fund's goals were to finance specific items related to protection and enhancement of the alligator population and industry, including salaries within the Department, law enforcement activities, marketing programs, and research on alligator conservation and management. La.R.S. 56:279B, App. C at 53a-54a.

Second, the Legislature created a governmental entity — the Advisory Council — within the Department. The Advisory Council is responsible for reviewing and approving recommended procedures and programs to be funded in part by the Alligator Resource Fund. The Secretary (or his designee) is an *ex officio* member of the Advisory Council and is required

by law to attend all official meetings. La.R.S. 56:266C, App. C at 51a. Moreover, all eleven members of the Council are appointed and may be removed by state officials (the Secretary and the two elected leaders of Louisiana's Legislature). The Council reviews and approves programs and services implemented by the Department and recommends expenditures from the Resource Fund. The Department, not the Council, creates and controls its own budget.

Furthermore, the Louisiana Legislature sets the tag fees which help fund the Alligator Resource Fund. R.S. 56:253, App. C at 50a. Such fees are not fixed or controlled by the Advisory Council, but are under the Department's administrative control. *See, e.g.*, 28 La. Register 1874. The Secretary exercises veto power over the Council's recommendations regarding expenditures from the Fund, and the Department, not the Council, is responsible for annual reporting to the Legislature on the status and uses of fund revenues. La.R.S. 56:279E.

This statutory scheme confirms that the State of Louisiana, through the Legislature, the Department and its Secretary, is substantially involved in the workings of the Advisory Council, that the marketing recommended and approved by the Advisory Council is directly related to state goals and interests, and that the state maintains editorial control of the message and is the literal speaker. The Council is not an industry self-help group but an advisory and oversight council (whose members extend beyond the alligator industry) created to ensure that important and substantial state interests in the alligator, its habitat, and the industry are advanced by proper application of dedicated state revenue.

In *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995), the Court found that Amtrak is subject to the First Amendment when it regulates advertising displayed at its

facilities. *Lebron* set out a three-part test for determining whether an entity is subject to the First Amendment when it restricts the speech of others: When "the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment."

Louisiana's alligator marketing program satisfies *Lebron*'s three-part test. First, the legislative branch of the State of Louisiana created the Advisory Council[4] "by special law," La.R.S. 56:266C, App. C at 50a. Second, the Council is responsible "for reviewing and approving recommended procedures and programs" to be funded by the Resource Fund. La.R.S. 266C, App. C at 50a. Each of the specific goals of the Alligator Resource Fund constitutes a "governmental objective" under *Lebron*. These include funding research on alligator conservation and techniques needed to enhance the industry, and funding "management of the alligator population through proper management, harvest, and farm facility management." La.R.S. 56:279B(5), App. C at 54a. And, third, the State of Louisiana appoints not only a majority, but all of the Council's members. (The Secretary appoints nine members; the speaker of the House of Representatives and the president of the Senate each appoint one member.) La.R.S. 56:266C, App. C at 51a.

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4. The Advisory Council is not a corporation under Louisiana law; rather, it is "within the Department of Wildlife and Fisheries." La.R.S. 56:266C, App. C at 50a. This appears to be a distinction without legal significance; in fact, the Advisory Council's existence "within" the Department more easily supports a finding that the Council is "part of the Government for purposes of the First Amendment," *Lebron*, 513 U.S. at 400, then if it were a separate corporation.

Because Louisiana enacted the "tag fee" system to serve public purposes, directs the message to be disseminated, created a governmental entity to disseminate it, and requires the Secretary's continuing control over that entity, the challenged law is properly understood as creating a program of government speech. The First Amendment does not prohibit the imposition of fees to fund such programs. *See Southworth*, 529 U.S. at 229.

C. The Court Of Appeals Incorrectly Found That The Speech In Question Is Not Government Speech.

The Fifth Circuit found that the challenged alligator marketing program is "not government speech, but government facilitation of the private speech of fur and alligator harvesters." 365 F.3d at 429, App. A at 12a. The court of appeals relied on three factors in reaching its decision: first, the method by which the Department funds the Advisory Council, the composition and operation of the Council, and an application of the policies underlying the government speech doctrine. *Id.*

In *Keller v. State Bar of California*, *supra*, which presented a First Amendment challenge to the use of mandatory dues to fund a state bar's political speech, the Court analyzed at length whether the state bar was a governmental entity. 496 U.S. at 10-13. It was only after concluding that the state bar was not speaking as the government when, for example, it endorsed a nuclear weapons freeze or a gun control initiative, *id.* at 6 n.2, that the Court turned to whether the disputed use of dues could be sustained as germane to the purposes that justified requiring lawyers to affiliate with the state bar, such as regulating the legal profession, *id.* at 13-17. *Keller* thus proceeded on the understanding that the government speech doctrine would defeat a First Amendment objection to compelled contributions to a program of what, in contrast to the speech in *Keller* itself, is properly classified as government speech.

In *Southworth*, which involved a First Amendment challenge to a state university's mandatory student activity fee used to fund extracurricular student speech, the Court contrasted that program with a program of government speech. 529 U.S. at 229 ("If the challenged speech here were financed by tuition dollars and the University and its officials were responsible for its content, the case might be evaluated on the premise that the government itself is the speaker."). The Court's discussion of the government speech doctrine in that context implies recognition that, when a program does involve government speech, an individual cannot assert a valid First Amendment objection to being required to contribute to its cost.

The Fifth Circuit in this case and the Sixth Circuit in *Michigan Pork* held incorrectly that generic advertising programs for alligators and pork are not government speech. Both courts relied on the facts that the programs are funded by assessments on the affected industry, not general tax revenues, and are carried out by entities whose members, while appointed by the government, are chosen from the industry. Neither fact detracts from the character of the generic advertising as government speech. The government is entitled to fund its speech through whatever means it considers most appropriate, including through assessments on those who participate in the industry that the government has chosen to promote.

The assessments are a kind of "user fee," which the Court has viewed as a permissible means of funding many government activities.[5] Moreover, the government is entitled to speak through

5. *See, e.g., United States v. Sperry Corp.*, 493 U.S. 52, 60-62 (1989) (upholding, as a permissible "user fee," a requirement that successful claimants before the Iran-United States Claims Tribunal pay a portion of any award to the U.S. Treasury as "reimbursement to the (Cont'd)

whatever public *or private* entity it considers most appropriate, and thus may speak through a legislatively-created body, which is composed entirely of members who are appointed and removable by state officials, and which acts under the Secretary's ongoing supervision and control.

D. The Question Whether Louisiana's Alligator Marketing Program Involves Government Speech Warrants The Court's Consideration.

The question whether the government speech doctrine defeats First Amendment challenges to assessments for generic advertising programs under Louisiana law and similar state and federal statutes is an important one for American businesses and consumers. The Court's intervention is warranted in this case, as it was in *United Foods* and in *Glickman*, and as it is in *Livestock Marketing/Nebraska Cattlemen* (pending before the Court), all of which raised First Amendment challenges to similar government programs.

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United States Government for expenses incurred" in connection with the Tribunal); *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 461-468 (1988) (observing that it is "manifestly rational" for a state "to allow local school boards the option of charging patrons a user fee for bus service" rather than funding such service out of general revenues); *Cox v. New Hampshire*, 312 U.S. 569, 576-577 (1941) (observing that a state may require payment of a reasonable parade license fee to compensate local government for its administrative and law enforcement expenses); *cf. United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 141 (1981) (White, J., concurring) ("No one questions, however, that the Government, the operator of the [postal] system, may impose a fee on those who would use the system, even though the user fee measurably reduces the ability of various persons or organizations to communicate with others.").

Petitioners in the *Nebraska Cattlemen* case listed in their petition the numerous First Amendment challenges to various agricultural commodity promotion and research programs, specifically citing the Fifth Circuit's decision in this case. According to those petitioners, these decisions "reveal profound disarray and confusion among courts in this important area of constitutional law." Petition for a Writ of Certiorari, No. 03-1165 at 25-26. The *amici* in the *Livestock Marketing* case (30 states and the Commonwealth of Puerto Rico) urged the Court to grant the then pending petition "to resolve this conflict in the circuits regarding application of the government-speech doctrine," citing the decisions from the Third Circuit (*Frame*), Fifth Circuit (this case), and Sixth Circuit (*Michigan Pork*) as in conflict with the Eighth Circuit's decision in *Livestock Marketing*. *See* Brief of Texas *et al.* as *Amici Curiae* in Support of Petitioners, *Veneman v. Livestock Marketing Association*, No. 03-1164 at 10-11.

Wholly apart from the problems engendered by the conflicting decisions from the circuit courts, this case presents an issue of national importance, evidenced by the participation of 30 states and the Commonwealth of Puerto Rico as *amici* in *Livestock Marketing*. At least 42 states have created commodity-marketing programs, and at least one state, Oregon, has such programs for 28 different commodities. *Id.* at 15 n.19. Resolution of challenges to state commodity-marketing programs may well depend on the question the Court has yet to address. As the Court has granted certiorari in the *Livestock Marketing* and *Nebraska Cattlemen* cases, it should also grant the petition in this case in order to resolve the government speech issue.

II. Louisiana's Assessments Are Constitutional Under The Intermediate Scrutiny Applicable To Regulations Of Commercial Speech.

Aside from the government speech question, this Court's review is warranted on the question whether Louisiana's assessment provisions withstand intermediate First Amendment scrutiny under the standard articulated in *Central Hudson* for regulations of commercial speech. The Fifth Circuit declined to decide whether the *Central Hudson* test applies to compelled subsidy challenges, but expressed "doubt" that it does. 365 F.3d at 434 n.21, App. A at 23a. Nevertheless, it held that Louisiana's alligator marketing program would not pass the test if it did apply:

> To pass this test, a restriction on commercial speech must directly advance a substantial government interest and burden First Amendment rights no more than necessary to accomplish that interest. *Central Hudson*, 447 U.S. at 566. Even granting *arguendo* that Louisiana has a substantial interest in conservation and that the message expressed by the Council's generic marketing helps advance that interest, Louisiana's program burdens First Amendment speech more than necessary. Louisiana does not need to compel alligator harvesters to support generic marketing, but could simply fund generic marketing from its general tax revenues. *Id.*

As the Court has explained, the *Central Hudson* standard does not require a legislature to employ the "least-restrictive-means" of regulation or to achieve a perfect fit between means and ends. *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989). It is sufficient that the legislature achieves a "reasonable" fit by

adopting regulations "in proportion to the interest served." *In re R.M.J.*, 455 U.S. 191, 203 (1982), *citing Central Hudson*, 447 U.S. at 563-64. Louisiana's alligator marketing program satisfies that standard.

Louisiana's program advances two "substantial" governmental interests: conserving its once threatened alligator population and insuring stability of the worldwide market for alligator products. Moreover, the state's alligator marketing program directly advances those interests. The Court has repeatedly recognized the "immediate connection between advertising and demand." *Central Hudson*, 447 U.S. at 569; *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 557 (2001) ("[W]e have acknowledged the theory that product advertising stimulates demand for products, while suppressed advertising may have the opposite effect."). The challenged assessment provisions play an integral role in advancing the state's interests.

Nor is the alligator marketing program "more extensive than is necessary to serve" the government interests. It imposes "no restraint on the freedom of any producer to communicate any message to any audience," does "not compel any person to engage in any actual or symbolic speech," and does "not compel the producers to endorse or to finance any political or ideological views." *Glickman*, 521 U.S. at 469-70. It requires only that alligator hunters and farmers contribute financially to generic marketing (and other activities) designed to benefit the alligator industry as a whole by promoting the sale of the product that the industry exists to market.

III. Louisiana's Alligator Marketing Program Is Part Of A Broader Regulatory Scheme That Exempts This Program From The First Amendment.

The Court has twice addressed the constitutionality of mandatory assessments for state generic advertising programs, *United Foods*, — where mushroom producers successfully challenged mandatory assessments for generic advertising — and *Glickman* — where the Court rejected a challenge to similar assessments by growers of fruit trees. The Fifth Circuit erroneously found that "Louisiana's generic alligator marketing program more closely resembles the mushroom program at issue in *United Foods* than the fruit program at issue in *Glickman*." 365 F.3d at 433, App. A at 19a. Petitioner submits that Louisiana's comprehensive regulation of the alligator population and industry constitutes a broad regulatory scheme like the one that validated the assessments in *Glickman*.

In *Glickman*, the Court upheld marketing orders issued by the Secretary of Agriculture against growers, handlers, and processors of California tree fruits. The orders were issued pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.*, which Congress enacted in order to maintain orderly marketing conditions and supply flow for agricultural commodities in interstate commerce. The marketing orders authorized assessments against fruit growers to finance various projects, including generic advertising. The marketing orders could limit quantity, quality, grade and size of the commodity to be marketed, and could provide for marketing research and development projects, including advertising.

The generic ads promoted the message that California summer fruits were wholesome, delicious, and attractive. The Court rejected a First Amendment challenge to the advertising program, pointing to the broad regulatory framework

in which the fruit growers operated. 521 U.S. at 469. The Court regarded the advertising component of the marketing orders as part of an overall regulatory scheme comprising valid economic regulation of transactions in agricultural commodities affected by a national public interest. *Id.*

The Court announced three factors that distinguished the regulatory scheme for fruit growers from laws that violate the First Amendment:

> First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic speech. Third, they do not compel the producers to endorse or to finance any political or ideological views. *Id.*

Each of these three factors applies equally to Louisiana's regulation of the alligator population and industry. First, Louisiana law does not impose any "restraint on the freedom of any producer to communicate any message to any audience." Louisiana alligator farmers and dealers are free to advertise and market their products and services as they see fit or, if they prefer, not at all. Second, Louisiana's regulatory scheme does not require respondent to engage in actual or symbolic speech. *But cf. West Va. State Bd. of Education v. Barnette*, 319 U.S. 624 (1943) (enjoining enforcement of a requirement that public school children salute the American flag); *Wooley v. Maynard*, 430 U.S. 705 (1977) (striking down New Hampshire's requirement that auto license plates contain the motto "Live Free or Die"). Third, Louisiana does not require anyone who pays an alligator tag fee to endorse or finance any political or ideological view. The message of Louisiana's marketing program

is straightforward, and far removed from politics or ideology -- the message that "the alligator trade is legal, sustainable and verifiable with conservation value." Exh. H at 23.

Four years after *Glickman*, the Court decided in *United Foods* that assessments on mushroom producers for generic advertising programs promoting mushroom sales pursuant to another federal statute, the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. § 6101 *et seq.*, violated producers' First Amendment rights. Unlike the regulatory program in *Glickman*, the assessments in *United Foods* were *not* ancillary to a more comprehensive regulatory program restricting market autonomy and the advertising itself was the principal object of the regulatory scheme. 533 U.S. at 415.

To distinguish this result from its earlier decision in *Glickman*, the Court noted that the mandatory fruit advertising program in *Glickman* was merely ancillary to a more comprehensive regulatory program restricting market autonomy, while the advertising program in *United Foods* was the principal object of the regulatory scheme and almost all of the funds collected under the mandatory assessments were used for one purpose, generic advertising, with no other regulatory framework governing how mushrooms may be produced and sold. The Court struck down the *United Foods* regulatory scheme on First Amendment principles it had previously applied in *Abood* and *Keller.*

The Fifth Circuit acknowledged "a number of interdependent state, federal, and international laws impos[ing] requirements on alligator harvesters," and "Louisiana's extensive regulation of alligator harvesting," 365 F.3d at 433, App. A at 20a, but nevertheless concluded that the "fees imposed here, though used for more than generic marketing, represent a

collective association only in the loosest sense of that term." 365 F.3d at 434, App. A at 21a. On the record before the Fifth Circuit, that conclusion was erroneous as a matter of law.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully requests that the Supreme Court grant this petition; alternatively, that the Court hold this petition pending its decision on the merits of the *Livestock Marketing/Nebraska Cattlemen* matters and, if the decision in those cases is favorable to petitioner herein, grant this petition, vacate the decision of the Fifth Circuit Court of Appeals insofar as it affirmed the district court's grant of injunctive relief, and remand to that court for reconsideration in light of this Court's decision in the *Livestock Marketing/ Nebraska Cattlemen* matters.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED APRIL 2, 2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-30523

PELTS & SKINS, LLC,

Plaintiff-Appellee,

versus

WILLIAM DWIGHT LANDRENEAU, Secretary for the Department of Wildlife and Fisheries,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Louisiana.

Before KING, Chief Judge, and BENAVIDES and CLEMENT, Circuit Judges.

BENAVIDES, Circuit Judge:

Plaintiff-Appellee Pelts & Skins farms alligators in Louisiana. Defendant-Appellant William Dwight Landreneau is Secretary of the Louisiana Department of Wildlife and Fisheries ("DWF"), the agency responsible for overseeing conservation of alligators.[1] Louisiana requires alligator

1. Mr. Landreneau replaced James A. Jenkins as secretary after the district court ruled. To avoid confusion, we refer to Mr. Landreneau as the Secretary.

hunters and farmers to pay various fees, and DWF uses a portion of those fees to support generic marketing of alligator products. Pelts & Skins alleges that this practice constitutes a compelled subsidy for private speech that violates the First Amendment. The district court agreed with Pelts & Skins and permanently enjoined use of the fees to support generic marketing of alligator products.

We conclude that Pelts & Skins lacks standing to challenge the use of certain alligator-related fees. With regard to the fees Pelts & Skins does have standing to challenge, we agree with the district court that the use of those fees for generic marketing violates the First Amendment. We therefore affirm in part, vacate in part, and remand in part.

I.

The American alligator was once endangered, but Louisiana law now allows the hunting and farming of alligators for their meat and skins. DWF regulates the hunting, farming, processing, and shipment of alligators and alligator parts. *See* La. Rev. Stat. Ann. § 36:602(B) (West Supp. 2004). DWF does not regulate the prices or marketing of alligators, but it does administer two funds, the proceeds of which support generic marketing of alligator products: the Louisiana Fur and Alligator Public Education and Marketing Fund (the "Marketing Fund") and the Louisiana Alligator Resource Fund (the "Resource Fund"). The generic marketing supported by these two funds is the focus of this case.[2]

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2. This type of scheme—compelled subsidies for generic marketing— has produced many familiar campaigns, including "Got

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Appendix A

The Marketing Fund derives its revenues from license fees, i.e., the fees associated with the hunting licenses that fur trappers and alligator hunters must carry. *See id.* §§ 56:251(A), 56:266(D). Twenty dollars of every twenty-five-dollar license fee are earmarked for the Marketing Fund.[3] *Id.* The Louisiana Legislature created the Marketing Fund to market alligator and fur products, to educate the public about the harvesting of those products, and to recommend strategies to the fur and alligator industry. *Id.* § 56:266(B).

The Resource Fund derives its revenues from a variety of fees imposed on alligator hunters, farmers, and processors. *Id.* § 56:279. The most notable of these fees is the tag fee, a charge for the tag that must be attached to every harvested alligator skin. *Id.* § 56:253(C).[4] The Legislature created the

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Milk?"; "Pork: The Other White Meat"; "The Incredible, Edible Egg"; "Ah . . . the Power of Cheese"; and "The Touch . . . the Feel of Cotton . . . the Fabric of Our Lives." *See Cochran v. Veneman*, 359 F.3d 263, 266 (3d Cir. 2004); *Mich. Pork Producers Ass'n v. Veneman*, 348 F.3d 157, 162 & n.2 (6th Cir. 2003), *petition for cert. filed sub. nom. Veneman v. Campaign for Family Farms*, 72 U.S.L.W. 3539 (U.S. Jan. 20, 2004) (No. 03-1043).

3. The state treasurer may apply collected fees to the Marketing Fund and the Resource Fund only after she ensures that state revenues can cover due and payable state debts. La. Rev. Stat. Ann. §§ 266(D)(1), 279(C)(1) (West Supp. 2004). The record does not indicate that the treasurer has ever applied alligator-related fees to state debts.

4. Section 56:253(C)(2)(a) allows DWF to charge up to four dollars per tag, and during some years, Pelts & Skins paid four dollars per tag. But starting in September 2002, DWF temporarily suspended the collection of two dollars of the regular four-dollar fee. La. Admin. Code tit. 76, § 701(A)(4)(a)(xi) (2003).

Resource Fund "to help defray the cost of alligator programs" administered by DWF. *Id.* § 56:279(A). The Resource Fund supports alligator-related research and, when surplus funds are available, helps to fund alligator-related law enforcement and marketing programs. *Id.* § 56:279(B).

DWF monitors both funds, and the Secretary must approve all expenditures for generic marketing, but another state-created entity, the Louisiana Fur and Alligator Advisory Council (the "Council"), is directly responsible for the content of the generic marketing and must review and approve all expenditures from the funds. *Id.* § § 266(C), 279(D)(3). The Council comprises the Secretary (or his designate), who serves ex officio, and eleven appointed members. *Id.* § 56:266(C). The speaker of the House and the president of the Senate each appoint one member. *Id.* The Secretary appoints nine members, and those nine members must represent "a cross-section of trappers, alligator hunters, coastal landowners, and alligator farmers." *Id.* Two of those nine members must represent a private organization, the Louisiana Alligator Farmers and Ranchers Association. *Id.* The Secretary may appoint the remaining seven members based on nominations from the Louisiana Trappers and Alligator Hunters Association. *Id.*

Pelts & Skins, as Louisiana's (and the world's) largest alligator farming operation, pays fees that account for roughly 25% of the alligator- related revenues received by DWF. Pelts & Skins does not object to the collection of these revenues but does object to the expenditure of these funds on generic marketing. According to Pelts & Skins, its business depends on convincing consumers that it produces a unique product

that is superior in quality to other alligator products. Generic alligator marketing undercuts this message because generic marketing does not differentiate between particular types, qualities, or brands of alligator products, but rather promotes the notion that alligator products in general are desirable, reliably available, and lawfully produced.[5] Pelts & Skins also hints broadly that the Council's generic marketing campaign, which consists mainly of sending representatives to fashion shows and setting up educational displays, is a boondoggle. However, Pelts & Skins is quick to clarify that its objection to generic marketing stems from the message of that marketing, not its efficacy.

Based on its objection to the generic marketing's content, Pelts & Skins sought to enjoin DWF from expending revenues from the Marketing Fund and the Resource Fund for generic alligator marketing. According to Pelts & Skins, Louisiana violated the First Amendment by imposing mandatory fees on Pelts & Skins, then using those fees to subsidize a message with which Pelts & Skins disagrees. In response, the Secretary argued (1) that the Tax Injunction Act of 1937 barred federal jurisdiction; (2) that the generic marketing at issue was government speech not subject to First Amendment scrutiny; and (3) that, in the alternative, the

5. Pelts & Skins' objection to the message embodied in generic marketing may seem minor, but the Supreme Court has explained that the perceived importance of a plaintiff's objection is immaterial. *See United States v. United Foods*, 533 U.S. 405, 411 (2001) ("First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors; and there is no apparent principle which distinguishes out of hand minor debates about whether a branded mushroom is better than just any mushroom.").

generic marketing was merely ancillary to a broader cooperative regime and therefore consistent with the First Amendment.

The parties agreed to submit the case on the record without live testimony. The district court determined (1) that the Tax Injunction Act did not bar federal jurisdiction; (2) that the generic marketing was not government speech; and (3) that the use of mandatory fees to fund generic marketing was not ancillary to a broader cooperative regime. *Pelts & Skins, L.L.C. v. Jenkins*, 259 F. Supp. 2d 482 (M.D. La. 2003). The court permanently enjoined the Secretary from "approving, authorizing or expending any revenue from the Louisiana Fur and Alligator Public Education and Marketing Fund or from the Louisiana Alligator Resource Fund for the purpose of generic alligator marketing." *Id.* at 494. The Secretary appealed.[6]

II.

We first address the Secretary's contention that Pelts & Skins lacks standing to challenge expenditures from the Marketing Fund. The Secretary failed to raise this argument in the district court, but a party may raise standing at any time, even on appeal. *Johnson v. City of Dallas*, 61 F.3d 442, 443-44 (5th Cir. 1995).

The first requirement of standing is that a party must demonstrate an injury in fact. *See McConnell v. FEC*, 124 S. Ct. 619, 707 (2003). Pelts & Skins alleges that it has been

6. The Secretary has appealed neither the district court's findings of fact nor its ultimate holding with regard to the Tax Injunction Act.

injured in fact because it must pay fees that directly support a message with which it disagrees. The Secretary claims that Pelts & Skins has failed to prove this injury with regard to the Marketing Fund. The Secretary concedes that Pelts & Skins has paid the tag fees that support the Resource Fund, and the record amply supports that concession.[7] However, according to the Secretary, Pelts & Skins has not shown that it has ever paid the license fees that support the Marketing Fund.

We agree with the Secretary that Pelts & Skins failed to prove that Louisiana's use of the marketing fund has caused an injury in fact. Because this case proceeded to final judgment,[8] "the factual allegations supporting standing (if controverted)[9] must be supported adequately by the

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7. We must address standing on a claim-by-claim basis, so Pelts & Skins cannot parlay its standing to challenge the Resource Fund into standing to challenge the Marketing Fund. *See James v. City of Dallas*, 254 F.3d 551, 563 (5th Cir. 2001).

8. As noted above, the parties agreed to let the hearing on Pelts & Skins' motion for summary judgment serve as a submission of the case on the merits. The district court treated the case as a trial on a stipulated record. *See Pelts & Skins*, 259 F. Supp. 2d at 483. At oral argument, Pelts & Skins claimed that it did not realize that the trial court would go beyond addressing the motion for summary judgment. However, even had this case been resolved on summary judgment, Pelts & Skins could not have rested on mere allegations, but would have had to set forth specific facts by affidavit or other evidence. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

9. This parenthetical does not mean that Pelts & Skins did not need to support its allegations with evidence because the Secretary

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evidence adduced at trial." *Walker v. City of Mesquite*, 169 F.3d 973, 978 (5th Cir. 1999); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Pelts & Skins must support each element of standing just as it would support any other matter on which it bears the burden of proof. *Lewis v. Casey*, 518 U.S. 343, 358 (1996).

Pelts & Skins has not carried this burden. Nowhere does the record indicate that Pelts & Skins ever held a hunting license or paid any fee that supports the Marketing Fund. Instead, Pelts & Skins relies on assertions in pleadings. Had the district court decided this case on a motion to dismiss, these allegations would be sufficient; however, once a case passes this preliminary stage, a plaintiff must set forth evidence of an injury in fact. *See Lujan*, 504 U.S. at 561 (1992); *Walker*, 169 F.3d at 978 & n.15.[10] The record contains no such evidence.

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failed to controvert those allegations in the district court. Were we to interpret *Walker* in this way, we would undermine the established rule that objections to standing may not be waived. *See Lang v. French*, 154 F.3d 217, 222 n.28 (5th Cir. 1998); *In re Weaver*, 632 F.2d 461, 463 n.6 (5th Cir. 1980).

10. Pelts & Skins also relies on a sentence from the Secretary's Answer in which the Secretary "admit[s] . . . that plaintiff does contribute to the fund." Answer ¶ 24. However, this so-called admission is ambiguous; the Secretary's statement does not specify which of the two funds Pelts & Skins has contributed to. Because this statement is less than "deliberate, clear, and unequivocal," it cannot serve as a judicial admission. *See Heritage Bank v. Redcom Labs., Inc.*, 250 F.3d 319, 329 (5th Cir. 2001).

Pelts & Skins also relies on the district court's finding that "plaintiff's farming operation is conditioned upon payment of mandatory fees ('license fees' and 'tag fees') to the DWF." 259 F. Supp. 2d at 483-84. We review for clear error the findings underlying a district court's determination of standing. *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 319 (5th Cir. 2002); *Pederson v. La. State Univ.*, 213 F.3d 858, 869 (5th Cir. 2000). A finding is clearly erroneous if a review of the evidence leaves us with a firm conviction that the district court has made a mistake. *Dickerson ex rel. Dickerson v. United States*, 280 F.3d 470, 474 (5th Cir. 2002). The absence of any evidence supporting the district court's finding firmly convinces us that, based on the record as it stands, the district court has made a mistake. *Cf. Walker v. U.S. Dep't of Hous. & Urban Dev.*, 99 F.3d 761, 770 (5th Cir. 1996).[11] Given the parties' failure to contest and to address standing in the district court, the district court's finding is unsurprising; nevertheless, that finding is clearly erroneous on this record.

On this record, therefore, Pelts & Skins lacks standing to challenge expenditures from the Marketing Fund. A district court may only remedy the injury in fact the plaintiff has established. *Lewis*, 518 U.S. at 357 (1996). We therefore vacate the portion of the injunction concerning the Marketing Fund.

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11. The Secretary also argues that the relevant statutes provide that only a natural person, not a corporate entity such as Pelts & Skins, can hold a hunting license. Because the district court can consider these arguments on remand, we need not discuss them except to say that neither the governing statutes, *see* La. Rev. Stat. Ann. § 56:8, 56:54 (West Supp. 2004), nor the governing regulations, *see* La. Admin. Code tit. 76, § 701 (2003), affirmatively support the district court's finding that Pelts & Skins must pay a hunting license fee to operate its business.

When jurisdiction is not clear from the record but could exist, we may remand to the district court so that the parties may supplement the record. *Mollett v. Penrod Drilling Co.*, 872 F.2d 1221, 1228 (5th Cir. 1989). Remand is especially appropriate when, as in this case, jurisdiction may hinge on a simple factual matter that was left untested because the parties did not dispute standing in the district court. After further review, the district court may determine that Pelts & Skins has paid the license fee. We therefore remand this case in part. On remand, the district court should ascertain whether Pelts & Skins has standing to challenge the Marketing Fund and modify the injunction accordingly.

III.

Although Pelts & Skins lacks standing to challenge use of the Marketing Fund, it has standing to challenge use of the Resource Fund. We therefore consider whether the use of the Resource Fund to promote generic alligator marketing violates the First Amendment. We review the district court's resolution of this constitutional question *de novo*. *Baby Dolls Topless Saloons, Inc. v. City of Dallas*, 295 F.3d 471, 482 (5th Cir. 2002).

A.

We first consider whether the generic alligator marketing is government speech or private speech. The government speech doctrine holds that "when the government appropriates public funds to promote a particular policy of its own, it is entitled to say what it wishes." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995).

The Secretary argues that generic alligator marketing is immune from First Amendment review because the State of Louisiana is speaking.[12]

We disagree. Not all government-facilitated speech is government speech. The government speech doctrine does not apply if a program is "designed to facilitate private speech, not to promote a governmental message." *Velazquez*, 531 U.S. at 542. In this case, three considerations—the method by which DWF funds generic marketing, the composition and operation of the Fur and Alligator Advisory

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12. The Supreme Court has not determined how the government speech doctrine applies to compelled subsidies for generic marketing. Neither of the two Supreme Court cases addressing mandatory assessments for generic marketing considers the question of government speech. *See United States v. United Foods, Inc.*, 533 U.S. 405 (2001); *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997). In *United Foods*, the Court intimated that the government speech doctrine might have been applicable to the issue of compelled assessments for generic marketing but expressly reserved this question because the argument was not raised or addressed in the court of appeals. 533 U.S. at 416-17.

Rather, courts usually consider the government speech doctrine when plaintiffs challenge restrictions on government-funded expression as content- or viewpoint-discriminatory. *See, e.g., Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 536-37 (2001) (striking down restrictions that barred government-funded lawyers from challenging the validity of welfare statutes); *Rosenberger*, 515 U.S. at 822-28 (striking down state university's restrictions on use of student activities funds for religious publications); *Rust v. Sullivan*, 500 U.S. 173, 177-83 (1991) (upholding restriction that barred recipients of federal funds from discussing abortion as a method of family planning).

Council, and an application of the policies underlying the government speech doctrine—convince us that the generic marketing at issue is not government speech, but government facilitation of the private speech of fur and alligator harvesters.[13]

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13. Three other circuits addressed the application of the government speech doctrine to programs similar to the generic alligator marketing program and uniformly concluded that this type of producer-funded generic marketing is not government speech.

The Third and Sixth Circuits relied upon two basic considerations: first, that assessments on producers rather than general revenues funded the marketing; and second, that the organizations responsible for the content of the generic marketing represented private rather than governmental interests. *See Cochran*, 359 F.3d at 273-74 (generic milk marketing); *Mich. Pork*, 348 F.3d at 161-62 (generic pork marketing); *United States v. Frame*, 885 F.2d 1119, 1131-33 (3d Cir. 1989) (generic beef marketing).

The Eighth Circuit declared the government speech doctrine categorically inapplicable to compelled subsidy cases. *See Livestock Mktg. Ass'n v. U.S. Dep't of Agric.*, 335 F.3d 711, 720 (8th Cir. 2003), *petition for cert. filed sub. nom. Veneman v. Livestock Mktg. Ass'n*, 72 U.S.L.W. 3539 (U.S. Feb. 13, 2004) (No. 03-1164). The Supreme Court's treatment of compelled subsidy challenges convinces us that the government speech doctrine is at least potentially applicable to this general category of cases. In *Keller v. State Bar*, the Court invoked the government speech doctrine and analyzed whether an integrated state bar was a government agency before turning to the question of whether bar dues constituted an impermissible compelled subsidy for private speech. 496 U.S. 1, 10-13 (1990). In *Board of Regents of University of Wisconsin System v. Southworth*, the Court considered a compelled subsidy challenge to mandatory student fees and stated in dictum that, had the state university not denied that the speech at issue was government speech, "the analysis likely would be altogether different." 529 U.S. 217, 235 (2000).

First, the method by which DWF funds generic alligator marketing suggests that generic alligator advertising is the message of fur and alligator harvesters, not Louisiana as a whole. Government speech is typically funded from a government's general revenues, not assessments levied on a particular group. *See Keller*, 496 U.S. at 11; *Mich. Pork*, 348 F.3d at 162; *Frame*, 885 F.2d at 1132-33. The portions of the Resource Fund administered by the Council do not come from general state revenues; rather, they come from fees levied on only one group: harvesters of furs and alligators. The Resource Fund remains in an account segregated from the State's general revenues. La. Rev. Stat. Ann. § 56:279(C)(1) (West Supp. 2004). Moreover, the expenditures recommended, reviewed, and approved by the Council primarily concern precisely those persons who must contribute to the Resource Fund. This "close nexus" between the individuals who pay for the speech and the content of the speech suggests that Louisiana is facilitating a private message, not expressing its own. *See Frame*, 885 F.2d at 1132.

Second, an organization that represents private interests, the Council, is primarily responsible for the generic marketing campaign. *Cochran*, *Michigan Pork*, and *Frame* all dealt with generic marketing programs run by industry-specific councils. In each of these cases, the federal agriculture secretary appointed the members of the council based on nominations from industry representatives. Because these councils were composed of industry representatives, the courts determined that those councils, though appointed by the government, represented private interests. *See Cochran*, 359 F.3d at 274; *Michigan Pork*, 348 F.3d at 162; *Frame*, 885 F.2d at 1133.

Likewise, although the Council is a government creation, the composition of the Council demonstrates that it represents

primarily private interests.[14] The Secretary or his designate serves on the Council ex officio, and he and other government officials appoint all the remaining members of the Council, but the Secretary does not enjoy plenary discretion to appoint any person to the Council. La. Rev. Stat. Ann. § 56:266(C) (West Supp. 2004). Rather, he must appoint a carefully calibrated "cross section of trappers, alligator hunters, coastal landowners, and alligator farmers." *Id.* Two members of the Council must represent a private organization, the Louisiana Farmers and Ranchers Association. *Id.* The Secretary may choose all nine of the Council members he appoints based on nominations from private organizations, *id.*, and the record suggests that the Secretary does so. Because representatives of private alligator harvesters compose the heavy majority of the Council, it naturally reflects private rather than governmental interests.[15]

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14. The Secretary argues that alligator marketing is government speech because the Council's governing statutes lay out specific goals and articulate Louisiana's interest in promotion of the alligator industry. *See* La. Rev. Stat. Ann. § § 56:266(B), 56:279(A) (West Supp. 2004). The fact that the government has an interest in facilitating private speech does not convert that speech into a governmental message. The federal government laid out similar interests in the statutes at issue in *Michigan Pork*, *Livestock Marketing*, and *Frame*, but none of those courts considered the articulation of those interests relevant. *See Mich. Pork*, 348 F.3d at 159; *Livestock Mktg.*, 335 F.3d at 713-14; *Frame*, 885 F.2d at 1122-23. Moreover, in *Velazquez*, the Court held that the legal representation at issue was not government speech despite the fact that Congress had articulated a governmental interest in funding legal representation for indigent litigants. 531 U.S. at 536, 541-42.

15. In *Lebron v. National Railroad Passenger Corp.*, the Supreme Court considered whether Amtrak was "an agency or instrumentality of

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Furthermore, although the Secretary portrays alligator marketing as a DWF-run program, the Council, not DWF, primarily controls how the Resource Fund is used.[16] *Cf. Michigan Pork*, 348 F.3d at 162. DWF cannot spend money from the Resource Fund without the Council's approval. La. Rev. Stat. Ann. § 56:279(D)(3) (West Supp. 2004). Moreover, the record suggests that DWF's approval of contracts recommended by the Council is largely perfunctory. *Cf. United Foods*, 533 U.S. at 416-17 (suggesting in dictum that evidence of *pro forma* oversight implies that government-facilitated generic marketing is not government speech). Our review of the record reveals no evidence that DWF crafts or edits the content of any of the generic marketing at issue; rather, this task falls to private

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the United States for the purpose of individual rights guaranteed against the Government by the Constitution." 513 U.S. 374, 394 (1995). *Lebron*, however, involved an issue very different from the question presented in this case. In *Lebron*, an artist sued to compel Amtrak to display political artwork on an Amtrak-owned billboard. *Id.* at 376-78. The question was not whether Amtrak's use of the billboard was government speech; like a privately-owned billboard, the Amtrak billboard was designed to facilitate promotion of private messages. *Id.* Rather, the question in *Lebron* was whether the First Amendment placed any limitations on Amtrak's use of the billboard. *Id.* We thus consider *Lebron* inapplicable to the issue at hand. *Accord Cochran*, 359 F.3d at 274 n.10; *Livestock Mktg.*, 335 F.3d at 720 n.5.

16. To be sure, DWF could exercise limited control over the Council. Aside from his appointment power, the Secretary also retains the power to veto the Council's expenditures from the Resource Fund. *See* La. Rev. Stat. Ann. § 56:279(D) (West Supp. 2004). The record, however, contains no evidence that the Secretary has ever exercised that veto.

contractors hired by the Council to market alligator products. Thus, the Council, not DWF, is primarily responsible for generic alligator marketing.

Third, the policies underlying the government speech doctrine do not support the application of that doctrine to this case. One rationale for the government speech doctrine is that, without the doctrine, "every citizen [would] have a right to insist that no one paid by public funds express a view with which he disagreed . . . and the process of government as we know it would be radically transformed." *Keller*, 496 U.S. at 12-13. This case, however, does not raise the specter of lawsuit-induced paralysis. As our discussion of standing demonstrates, only members of the narrow group compelled to contribute funds to subsidize directly a private message have standing to challenge the expression at issue.

A second rationale for the government speech doctrine is that "[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy." *Velazquez*, 531 U.S. at 541 (quoting *Southworth*, 529 U.S. at 235). In contrast, the government can easily avoid accountability when it imposes costs on a single, narrow group to facilitate a specialized message, especially if only a small minority of that group objects to the message expressed.

We are not dealing with a program funded from general revenues by broadly applicable taxes. Nor are we dealing with a governmental message crafted, controlled, and expressed by an agency designed to represent state

government. Rather, in this case we confront a program in which the government uses its authority to exact fees from private individuals, then facilitates the use of those fees to express a message designed to benefit private commercial interests. This sort of program is not government speech.

B.

Because we have determined that use of the Resource Fund for generic marketing represents a compelled subsidy for private speech, we must decide whether that compulsion is nonetheless permissible. The Supreme Court has twice addressed compelled subsidies for generic marketing. In *Glickman v. Wileman Bros. & Elliot., Inc.*, 521 U.S. 457 (1997), the Court upheld compelled subsidies for generic fruit marketing. In *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), the Court struck down compelled subsidies for generic mushroom marketing. We must mediate between these two contrasting precedents, or, in the words of the district court, "determine whether Louisiana alligator producers are more like mushroom producers than like peach producers." *Pelts & Skins*, 259 F. Supp. 2d at 483.

In *Glickman*, the Court evaluated a New Deal-era regulatory scheme that required producers of peaches, plums, and nectarines to participate in "[c]ollective, rather than competitive, marketing." 521 U.S. at 461. This collective marketing scheme "displaced competition" by imposing uniform prices, dictating the quality and quantity of the fruits marketed, determining the grade and size of the fruits sold, providing for the orderly disposition of surplus, authorizing joint research and development projects,

requiring standardized packaging, and even exempting affected producers from antitrust laws. *Id.* As part of this displacement of competition, the government required producers to pay for generic marketing of the fruit. *Id.* A group of growers alleged that the assessments violated the First Amendment. The Court upheld the assessments only after "stress[ing] the importance of the statutory context." *Id.* at 469. Because the growers were part of a "broader collective enterprise in which their freedom to act independently [was] already constrained by the regulatory scheme," the Court characterized the assessments for generic marketing as "a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress." *Id.* at 477.

Later, in *United Foods*, mushroom handlers refused to pay mandatory assessments to fund generic mushroom marketing. 533 U.S. at 408-09. The Court struck down the assessments as violations of the handlers' First Amendment right not to subsidize speech with which they disagreed. *Id.* at 409. Unlike the program in *Glickman*, the Court reasoned, the mushroom program was not "ancillary to a more comprehensive program restricting marketing autonomy." *Id.* at 411. Rather, the generic mushroom advertising, "far from being ancillary, [was] the principal object of the regulatory scheme." *Id.* at 411-12. The Court summarized its compelled subsidy cases and enunciated a guiding principle: When the government binds individuals into a collective association, the government can also require that those persons subsidize speech germane to the purpose underlying the association. *United Foods*, 533 U.S. at 413-15; *see also Keller*, 496 U.S. at 13-14 (integrated bar);

Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235-36 (1977) (closed union shop). Because the mushroom program did not require association except to support generic marketing, the program violated the First Amendment. *United Foods*, 533 U.S. at 415-16.

We agree with the district court that Louisiana's generic alligator marketing program more closely resembles the mushroom program at issue in *United Foods* than the fruit program at issue in *Glickman*. The *Glickman* rule permitting compelled subsidies applies when individuals have been "bound together" in a collective. *United Foods*, 533 U.S. at 412; *accord Cochran*, 359 F.3d at 275; *Delano Farms Co. v. Cal. Table Grape Comm'n*, 318 F.3d 895, 898-99 (9th Cir. 2003) (striking down compelled subsidies for generic grape marketing). Without an underlying collectivized association, a state cannot justify a compelled subsidy. *See United Foods*, 533 U.S. at 413-15. Louisiana alligator producers are not part of a collective association akin to *Glickman* 's marketing cooperative. None of the laws governing alligator production imposes collective rather than competitive marketing as the scheme in *Glickman* did. *Cf. Cochran*, 359 F.3d at 275. Rather, as the Secretary admits, the State of Louisiana does not regulate prices in the alligator market, and alligator harvesters are free to negotiate prices and to market products as they wish.[17]

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17. *Abood* and *Keller* allow compelled subsidies for speech that is germane to a lawfully compelled collective association. *Abood*, 431 U.S. at 235-36; *Keller*, 496 U.S. at 14. In this case there is no underlying association to which the generic marketing could be germane. Therefore, we need not determine whether generic marketing is germane to Louisiana's other alligator-related regulations.

The Secretary emphasizes Louisiana's extensive regulation of alligator harvesting and argues that generic alligator marketing, like generic peach marketing, is permissible because it is ancillary to Louisiana's alligator regulations.[18] Regulations alone do not create compelled association. *See Cochran*, 359 F.3d at 275; *Delano Farms*, 318 F.3d at 899. In *Glickman*, the fruit producers were subject to a specific type of regulation: a scheme that displaced individual marketing efforts and thus necessitated collective generic marketing. *See* 521 U.S. at 461. Likewise, in *Keller* and *Abood*, the state required that individuals join a collective interest group; to be effective, that interest group had to speak on behalf of its members on certain issues. *See Keller*, 496 U.S. at 14-15; *Abood*, 431 U.S. at 220-23. A number of interdependent state, federal, and international laws impose requirements on alligator harvesters, but these laws do not require collective association, and "it is only the overriding *associational* purpose which allows compelled subsidy for speech in the first place." *United Foods*, 533 U.S. at 413 (emphasis added).[19]

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18. The Secretary also seeks to distinguish *United Foods* and its progeny by pointing out that those cases involved privately-owned commodities, whereas alligators are the property of the State of Louisiana. La. Civ. Code Ann. art. 3413 (West 1994). However, this case does not involve the marketing of live wild alligators, but the marketing of products made from lawfully captured and enclosed alligators, which are private property. *See id.* arts. 3413, 3415.

19. In *Glickman*, the Court identified three ways in which the regulatory scheme at issue was different from laws found to abridge the First Amendment: (1) the assessments did not bar producers from communicating their own messages; (2) the assessments did not

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We recognize that, unlike the assessments at issue in *United Foods*, *Cochran*, and *Delano Farms*, a majority of the alligator-related assessments fund programs other than generic marketing. *See United Foods*, 533 U.S. at 411-12; *Cochran*, 359 F.3d at 276; *Delano Farms*, 318 F.3d at 899. In each of the past several years, the Council has spent approximately 15% of the Resource Fund on generic marketing and the remainder on research and law enforcement. This distinction in the percentage of fees that go to generic marketing does not support applying *Glickman* to this case. The key element of *Glickman*—a highly collectivized marketing association—is still absent. The common thread uniting *Abood*, *Keller*, *Glickman*, and *United Foods* is that compelled subsidization of speech is permissible when individuals have been bound into a collective association. *United Foods*, 533 U.S. at 413-15. The fees imposed here, though used for more than generic marketing, represent a collective association only in the loosest sense of that term.[20]

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compel the producers to engage in any actual or symbolic speech; and (3) the assessments did not compel endorsement of any political or ideological views. 521 U.S. at 469. The Secretary urges us to consider these factors. However, "[t]hese points were noted in *Glickman* in the context of a different type of regulatory scheme and are not controlling of the outcome." *United Foods*, 533 U.S. at 411. The Court in *United Foods* was especially careful to emphasize that the non-political, non-ideological nature of the generic marketing was irrelevant. *Id.* at 410-11. Because the compelled subsidies in this case are materially distinct from the collective marketing scheme at issue in *Glickman*, these three factors are irrelevant to this case.

20. The Secretary observed at oral argument that, in other compelled subsidy cases, courts have struck down entire marketing

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In sum, Louisiana's alligator regulations are more analogous to the mushroom marketing program in *United Foods* than to the fruit marketing collective in *Glickman*. The use of mandatory fees for generic marketing is not ancillary to a government-imposed collective association. Louisiana's use of the Resource Fund to support generic marketing therefore violates the First Amendment.[21]

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programs and invalidated the collection of assessments. *E.g.*, *United Foods*, 533 U.S. at 408-09; *Cochran*, 359 F.3d at 280; *Mich. Pork*, 348 F.3d at 159; *Livestock Mktg.*, 335 F.3d at 713; *Delano Farms*, 318 F.3d at 897. In contrast, Pelts & Skins does not seek to stop paying alligator-related fees, but instead challenges only the use of those fees. The Secretary argues that the limited nature of this challenge proves that generic marketing is concomitant to other programs supported by the Resource Fund. Although generic marketing might be one of a number of alligator-related programs, it is not ancillary to any associational regulatory scheme, much less the type of marketing collective at issue in *Glickman*.

21. The Secretary contends that, even if the alligator marketing program burdens First Amendment rights, that program survives constitutional review under the test for restrictions on non-misleading commercial speech enunciated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980).

United Foods did not explain if or how the *Central Hudson* test applies to compelled subsidy cases, *see* 533 U.S. at 410, and other circuits have diverged on this question, *compare Mich. Pork*, 348 F.3d at 163 (refusing to apply *Central Hudson* test to compelled subsidy for generic pork marketing), *with Livestock Mktg.*, 335 F.3d at 722-726 (adapting *Central Hudson* test to compelled subsidy for generic beef marketing).

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IV.

As the record stands, Pelts & Skins has not proven that it has standing to challenge use of the Marketing Fund. Therefore, we vacate the portion of the injunction barring Louisiana from using the Marketing Fund to support generic alligator marketing and remand so that the district court may determine whether Pelts & Skins has standing and modify the injunction accordingly.

With regard to the remaining challenge, we conclude that Louisiana's use of the Resource Fund to support generic marketing violates the First Amendment. We therefore affirm the district court's judgment granting a permanent injunction against use of the Resource Fund for generic alligator marketing.

AFFIRMED in part, VACATED in part, and REMANDED in part.

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We doubt that the *Central Hudson* test applies. *See Glickman*, 521 U.S. at 474 n.18 (questioning in dictum "why the *Central Hudson* test, which involved a restriction on commercial speech, should govern a case involving the compelled funding of speech"). Like the Third Circuit, however, we choose to leave this question open because even were we to apply the *Central Hudson* test, Louisiana's alligator marketing program would not pass it. *See Cochran*, 359 F.3d at 277-80. To pass this test, a restriction on commercial speech must directly advance a substantial government interest and burden First Amendment rights no more than necessary to accomplish that interest. *Central Hudson*, 447 U.S. at 566. Even granting *arguendo* that Louisiana has a substantial interest in conservation and that the message expressed by the Council's generic marketing helps advance that interest, Louisiana's program burdens First Amendment speech more than necessary. Louisiana does not need to compel alligator harvesters to support generic marketing, but could simply fund generic marketing from its general tax revenues.

APPENDIX B — FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA DATED AND FILED APRIL 24, 2003

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION

NO. 02-CV-384

PELTS & SKINS, L.L.C.

VERSUS

JAMES JENKINS, JR., SECRETARY OF THE LOUISIANA DEPARTMENT OF WILDLIFE AND FISHERIES

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PROLOGUE

The Supreme Court has held that the Constitution prohibits the government from compelling the producers of mushrooms to pay for generic advertising to which they object, but allows the government to compel the producers of peaches to pay for such advertising. Resolution of this case requires the court to determine whether Louisiana alligator producers are more like mushroom producers than like peach producers. The answer to that riddle determines whether a Louisiana statute compelling farmers of alligators to fund generic advertising treads upon the First Amendment rights of plaintiff. For reasons that follow, this court

ultimately concludes that the alligator resembles the mushroom more than the peach, and thus, that the First Amendment stands between alligator farmers and Louisiana's mandatory assessments to pay for a generic alligator advertising program.

BACKGROUND

This matter came before the court on a motion for summary judgment by plaintiff, Pelts & Skins, L.L.C. ("Pelts & Skins"), for judgment in the form of a permanent injunction against defendant, James Jenkins, Jr., Secretary of the Louisiana Department of Wildlife and Fisheries ("DWF") (doc. 29). Defendant opposes the motion (doc. 36). Thereafter, the parties agreed that the February 7, 2003 hearing on plaintiff's motion would serve as a submission of the case on the merits (doc. 43). All evidence submitted in support of and in opposition to the motion for summary judgment, as well as all other exhibits filed at the hearing, have been received by stipulation of the parties on the merits of the case. After consideration of the law, evidence, and arguments of counsel, the court renders its findings of fact and conclusions of law in accordance with Fed.R.Civ.P. 52(a), as follows:

FINDINGS OF FACT

1. Plaintiff's alligator farming operation is conditioned upon payment of certain mandatory fees ("license fees" and "tag fees") to the DWF. These fees are deposited into both the Louisiana Fur and Alligator Public Education and Marketing Fund and the Louisiana Alligator Resource

Fund. A portion of revenues from these funds is then used by the DWF, as recommended by the Alligator Advisory Council, to finance generic marketing of alligator products without differentiating any particular type, quality, or brand of alligator product.[1] For example, the DWF's public education and marketing programs are primarily carried out by Don Ashley and Christine Brewton. Ashley attends trade shows, implements and designs airport booths, and produces literature promoting alligator products. Brewton visits various fashion houses promoting Louisiana alligator products and has implemented various educational information materials setting forth the "marsh to market" program of alligator skins.

2. Plaintiff has its own internal system of grading quality. Its marketing strategy is based on communicating the quality and uniqueness of its branded alligator product. Plaintiff does the majority of its business in Europe.

3. Plaintiff is "vehemently"[2] opposed to the DWF's marketing message, even if, as the DWF argues, generic

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1. In its answer, defendant admits to plaintiff's statement in the complaint that "[t]he marketing efforts approved and authorized by DWF through Mr. Jenkins and thereby funded by the Alligator Marketing Fund and the Alligator Resource Fund are generic in the sense that they promote alligator products or Louisiana's alligator products in general, without differentiating any particular type, quality or brand of alligator products (hereafter, 'DWF's Generic Marketing')." Complaint for Injunctive Relief, ¶ 21.

2. It is not clear to the court that vehemence is of constitutional significance, but since plaintiff insists upon so describing its stance, let it be duly noted for the record that plaintiff not only objects, but "vehemently" objects to the message of state's advertising program.

marketing does not dilute product image in the mind of the consumer and does not reduce producer profits by lowering prices.[3]

4. According to the DWF's expert, Charles C. Theriot, of the total alligator industry related revenues received in the fiscal year ending 2002, approximately 92% were credited to the Resource Fund and 6% to the Education and Marketing Fund. From 1997 to 2002, the total alligator-related generic advertising and marketing expenditures made by the DWF from the Resource Fund were: 1% in 1997, 15% in 1998; 16% in 1999; 20% in 2000; 16% in 2001; and 14% in 2002.

5. Mr. Theriot also calculates that if educational expenditures made by the DWF are included as part of the DWF's alligator-related generic advertising and marketing expenditures and are included with those expenditures, then the total alligator-related generic advertising and marketing expenditures as a percentage of the total revenues realized by the DWF were: 1% in 1997, 9% in 1998, 12% in 1999, 22% in 2000, 16% in 2001, and 21% in 2002.[4]

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3. Any weight placed by either plaintiff or defendant upon the effectiveness of the generic marketing is irrelevant. For First Amendment purposes, it is enough that plaintiff is opposed to the marketing message and that plaintiff is one of a small part of society that is compelled to pay the cost of such advertising.

4. The court is aware of plaintiff's argument that Mr. Theriot's report fails to specify the criteria used to determine whether a particular expenditure was for generic marketing and that the report does not account for generic marketing financed by the Education and Marketing Fund.

6. Defendant argues in brief that licensing fees are the only sources of income for the Education and Marketing Fund and are *de minimis* compared to the tag fees that account for the majority of the Resource Fund. Defendant argues further that the percentage of the total income used for generic marketing and public education is less than 25% of the annual funds received and that approximately 75% is used for maintaining proper research habitat, law enforcement, and so on. First of all, plaintiff maintains that it exports in excess of 80,000 raw skins per year and pays annual tag fees in excess of $320,000. Moreover, Mr. Theriot's report maintains that the plaintiff's own alligator-related payments were approximately 22.6%, 25.4%, and 25.1% of the total alligator-related revenue realized by the DWF from all sources for the fiscal years ending 2000, 2001, and 2002, respectively. The fact that plaintiff was responsible for approximately one quarter of the DWF's alligator revenue undermines defendant's *de minimis* argument. To trample upon one's First Amendment rights "just a little bit" does not rectify the fact that those rights are being trampled upon.

7. The DWF controls and supervises all wildlife within the state, including fish, and is charged with management, protection, conservation, and replenishment of the wildlife and fish. The DWF also regulates the shipping of skins. La.R.S. 36:602(B).

8. The DWF has statutory authority to establish regulations and licensing procedures regarding the taking, possessing, and shipping of all alligators, raw alligator skins, and alligator parts. La.R.S. 56:251(A)(2)(a)(iii).

9. Pursuant to La.R.S. 56:253(C)(1), every resident alligator hunter or farmer or nonresident alligator hunter must attach a tag to any out-of-state shipment of alligators or alligator skins. The tag must be secured from the DWF and must bear a certain color and serial number. Before shipping alligator or raw alligator skins out of state, La.R.S. 56:253(C)(2)(a) requires resident alligator hunters and farmers and nonresident hunters to pay to the DWF an alligator shipping label fee for each alligator and an alligator hide tag fee for each raw skin. The alligator shipping label fee and the alligator hide tag fee may be no more than four dollars per alligator or skin.[5] No alligator part may be shipped out of state without having affixed a label bearing the DWF license number and other information to the shipment. La.R.S. 56:253(D).

10. Every resident alligator hunter must pay a $25 annual license fee to DWF before commencing business. La.R.S. 56:251(2)(a)(i). Payment of an additional $25 entitles a duly licensed resident alligator hunter to another license authorizing him to be accompanied by one resident assistant while hunting. La.R.S. 56:251(2)(a)(ii). Only bona fide residents may apply for a resident alligator hunter's license. La.R.S. 56:252(A).

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5. "[H]owever, the alligator shipping label fee and the alligator hide tag fee shall each be reduced in any fiscal year by rule or regulation of the commission in an equal amount equivalent to any amount of additional revenues received into the Louisiana Alligator Resource Fund from the state general fund or sources other than alligator-related fees established pursuant to this Title." La.R.S. 56:253(C)(2)(a). The state currently charges two dollars for each tag.

Appendix B

11. The Louisiana Alligator Resource Fund, intended to defray the cost of alligator programs, is established by La.R.S. 56:279. This Fund is maintained by revenues received by the state from tag fees imposed on alligator hunters, alligator farmers, alligator shipping label fees on the sale of alligators, and all revenues derived from any other alligator-regulated fees and from the severance tax on alligator skins provided for in La.R.S. 56:256. La.R.S. 56:279(C)(1).[6]

12. Pursuant to La.R.S. 56:279(B)(1)-(5), the Resource Fund's five specific goals are as follows:

> (1) To provide salaries and financial support including associated indirect cost for the following positions, to provide a minimum of two full-time technical positions (biologists) and eight nontechnical positions such as computer operators, secretaries, and wildlife specialists existing within the fur and refuge division of the Louisiana Department of Wildlife and Fisheries.
>
> (2) To assist with funding for law enforcement activities associated with the alligator farm industry when surplus funds are available and recommended by the Louisiana Fur and Alligator Council.
>
> *(3) To assist with funding marketing programs recommended by the Louisiana Fur and Alligator*

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6. In 2002, the tag fees comprised 79% of the Resource Fund total.

Appendix B

Advisory Council[7] *when surplus funds are available.*

(4) To actively fund research on all aspects involved with alligator conservation and to develop the techniques needed to enhance the commercial alligator industry.

(5) To assist in funding management of the alligator population through proper management, harvest, and farm facility management.

(Emphasis added).

13. The Louisiana Fur and Alligator Public Education and Marketing Fund is established by La.R.S. 56:266. This Fund is maintained by the $25 license fees imposed upon trappers and alligator hunters as required by La.R.S. 56:251.[8]

14. Pursuant to La.R.S. 56:266(B)(1)-(7), the Education and Marketing Fund's seven specific goals are as follows:

(1) To educate the public regarding the need for trapping as a sound wildlife management tool and regarding the logic of managing furbearing species and alligators as renewable resources.

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7. As established by La.R.S. 56:266(C).

8. Twenty dollars of each twenty-five dollar alligator hunting license sold goes to the Education and Marketing Fund. La.R.S. 56:266(D)(1).

(2) To identify the current consumers of Louisiana furs and alligator hides.

(3) To identify present and potential Louisiana fur and alligator marketing problems, obstacles, and related significant issues.

(4) To strengthen existing markets and develop new markets and marketing strategies for raw and finished Louisiana fur and alligator products.

(5) To develop and implement an international advertising campaign to promote the utilization of raw and finished Louisiana fur and alligator products.

(6) To examine, evaluate, and make recommendations concerning any aspect of the fur and alligator industry including habitat management, harvest, and marketing which will enhance the future of the industry and perpetuate the conservation of these species.

(7) To make specific recommendations to the secretary regarding the expenditures of monies from the Alligator Resource Fund including any annual surplus only as provided for in R.S. 56:279.

(Emphasis added).

15. The Louisiana Fur and Alligator Advisory Council reviews and approves recommended procedures and programs to be funded from the Public Education and Marketing Fund and the Resource Fund, to ensure that fund revenues are expended for the Council's specific goals. La.R.S. 56:266(C).

16. Though Louisiana's statutory scheme is comprehensive and designed to protect a once-endangered species, the DWF is not statutorily authorized and has never attempted to regulate to whom alligator farmers may sell their skins, the manner in which farmers promote and market their skins, or the price at which farmers must sell their skins on the open market.[9]

CONCLUSIONS OF LAW

The Tax Injunction Act of 1937

1. Jurisdiction is based upon 28 U.S.C. § 1331. After consideration of the parties' post-hearing memoranda (docs. 44 and 45) regarding jurisdictional questions posed by the Tax Injunction Act, 28 U.S.C. § 1341, the

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9. The defendant places much weight on the alligator's former status as endangered, maintaining that if left unregulated, alligators threaten to recess back into endangerment. While state regulations may have had a hand in alligator regeneration, that is not reason enough to save a statute that stands in violation of the First Amendment. This is especially true when the maintenance of the alligator population could easily be achieved without generic advertising or when generic advertising could be funded through general, independent sources.

court concludes that the Act does not bar this action. First, Pelts & Skins does not seek to enjoin the "collection" of any monies (that is, plaintiff does not seek to enjoin the DWF from assessing the fees), but rather, seeks only to enjoin the Secretary from funding generic marketing with these fees. Second, the "fees" in question do not amount to "taxes" for purposes of the Act. *See Home Builders Ass'n of Mississippi, Inc. v. City of Madison, Mississippi*, 143 F.3d 1006, 1011 (5th Cir. 1998) ("[T]he classic tax sustains the essential flow of revenue to the government, while the classic fee is linked to some regulatory scheme. The classic tax is imposed by a state or municipal legislature, while the classic fee is imposed by an agency upon those it regulates. The classic tax is designed to provide a benefit for the entire community, while the classic fee is designed to raise money to help defray an agency's regulatory expenses." (footnotes omitted)); *Goetz v. Glickman*, 920 F.Supp. 1173, 1181 (D.Kan. 1996), *aff'd*, 149 F.3d 1131 (10th Cir. 1998) (noting that assessments under the Beef Promotion and Research Act were not direct taxes, since "[a] regulatory scheme will not constitute a tax unless the real purpose and effect of the statute and regulations promulgated thereunder is to raise revenues for the general support of the government." (citations omitted)).

2. Considering the foregoing, the mandated fees used for generic advertising are "contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the

group by law or necessity." *United States v. United Foods, Inc.*, 533 U.S. 405, 413, 121 S.Ct. 2334, 2339, 150 L.Ed.2d 438 (2001).

Government Speech

3. The DWF contends that the speech espoused through the generic advertising and public education programs is government speech since the state maintains a degree of editorial control, is the literal speaker, and is ultimately responsible for the speech. The defendant cites several cases in furtherance of its strong contention.[10]

4. The essence of government speech is when the government speaks in favor of a public policy. *See, e.g., Rust v. Sullivan*, 500 U.S. 173 (the federal government is free to determine how appropriated general tax money could be used—"the government may 'make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds.'" *Id.* at 192-193).[11]

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10. *Bd. of Regents of the Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000); *Rust v. Sullivan*, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991); *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'r.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980); *Sons of Confederate Veterans, Inc. v. Comm'r of the Virginia Dep't of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002); and *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003 (9th Cir. 2000), *cert. denied*, 532 U.S. 994, 121 S.Ct. 1653, 149 L.Ed.2d 636 (2001).

11. Neither of the two main cases at issue, *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997) nor *United Foods*, 533 U.S. 405, address the issue of government speech. *See Glickman*, 521 U.S. at 483 n. 2; *United Foods*, 533 U.S. at 416.

5. In *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), teachers sought a declaration that the "agency shop" clause of the collective bargaining agreement was invalid. The Court held, in part, that though the clause was valid insofar as it financed collective bargaining, contract administration, and grievance adjustments, First Amendment principles prohibited the union and the Board of Education from requiring any teacher to contribute (as a condition of employment as a public school teacher) to the support of an ideological cause he might oppose. In his concurrence, Justice Powell reasoned that a union is not representative of the people, but rather, is representative only of one segment of the population with certain common interests. *Abood*, 431 U.S. at 259 n. 13.

6. When attorneys challenged the use of compulsory state bar association dues to finance ideological or political activities with which members disagreed, the Court in *Keller v. State Bar of California*, 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990) held that the use of the dues in this manner violated the attorneys' First Amendment right of free speech when such expenditures were not necessarily or reasonably incurred for the purposes of regulating the legal profession or improving the quality of legal services. In so finding, the Court reasoned that the bar was different from a traditional governmental agency because it was not created to participate in state government; therefore, the bar was subject to similar

constitutional rules as was, for example, *Abood's* labor union. *Id.* at 13.[12]

7. When considering the constitutionality of a beef program funded by mandatory producer and importer contributions, one district court combined the above-

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12. See *United States v. Frame*, 885 F.2d 1119 (3rd Cir. 1989), *cert. denied*, 493 U.S. 1094, 110 S.Ct. 1168, 107 L.Ed.2d 1070 (1990), where the United States sought to recover assessments under the Beef Promotion and Research Act from a cattle buyer and producer. Despite finding that the Cattlemen's Board or the Operating Committee speaks on behalf of the Secretary and the government, the court found that the compelled expressive activities through assessments on cattle producers were not government speech, and, therefore, did implicate the First Amendment rights of those obligated to participate. The court reasoned that when general tax money is used to fund expressive activities, the "nexus" between the taxpayer and the message is attenuated. On the other hand, when a identifiable group's contributions fund a particular message associated with that group, then the government acts coercively. *Id.* at 1132. Though the court found no government speech, the ultimate conclusion was to sustain the Act's constitutionality based on the importance of the governmental interests. *Frame's* ultimate conclusion is not damaging to this ruling since the case is being used only for its government speech analysis (*United Foods* did not discuss it), that is, to determine whether the First Amendment is even implicated. It is not being used for its analysis of whether the First Amendment was indeed infringed upon-that determination has been undercut by the intervening logic of *United Foods*. *See Michigan Pork Producers v. Campaign for Family Farms*, 229 F.Supp.2d 772, 789 (W.D.Mich. 2002) (citing the 2001 *United Foods* decision as the justification for the differing ultimate conclusions in the 1989 *Frame* and 2002 *Livestock Marketing Ass'n v. United States Department of Agriculture*, 207 F.Supp.2d 992 (D.S.D. 2002) decisions, both of which considered the constitutionality of the Beef Promotion and Research Act).

referenced concepts from both *Abood* and *Keller* and concluded that the Beef Board was more akin to groups whose members are representative of one segment of the population (like *Abood's* labor union or *Keller* 's state bar association), and thus, that the generic advertising scheme of the Board was not government speech. *Livestock Marketing Ass'n*, 207 F.Supp.2d at 1004.[13]

8. Several cases have considered the degree of the government's involvement in the workings of whatever Board or Council manages mandatory assessments.[14] These cases generally maintain that the greater the degree of involvement, the greater chance that the government speech doctrine will be invoked. Here, however, while the Secretary does appoint nine of the Alligator Council's eleven members, he himself does

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13. *Livestock* also relied on *Frame*, noting that the Board's speech was not funded by general tax revenues, but rather, by mandatory contributions from cattle producers, importers, and others who sell cattle. This was found to be an extremely narrow segment of society and one that was not representative of the population in general. Reliance upon *Frame* in this manner was also employed by *Michigan Pork Producers*, 229 F.Supp.2d 772, where the court found that mandated assessments for generic pork advertising used to support certain educational and research programs was not government speech and ultimately, that the payments violated the objecting hog farmers' First Amendment rights. The court noted that while *United Foods* did not address government speech, the issue had been addressed by *Frame* in a context similar to the on in *Michigan Pork. Id.* at 787.

14. *See Frame*, 885 F.2d 1119; *Livestock*, 207 F.Supp.2d 992; *Michigan Pork Producers*, 229 F.Supp.2d 772.

not sit on the Council. Moreover, those he appoints do not represent him; rather, the statute requires that they represent a cross section of alligator trappers, hunters, farmers, and coastal landowners from across the state. La.R.S. 56:266(C).

9. The Alligator Advisory Council is responsible for reviewing and approving recommended procedures and programs to be funded from the Resource Fund and the Education and Marketing Fund to ensure that the revenues from the two funds are spent for the specific goals of the Council. The Resource Fund is sustained not through general tax dollars, but through mandatory tag fee revenues and the Education and Marketing Fund is sustained through mandatory licensing fee revenues. These fees are paid by alligator trappers, farmers, and hunters who, like *Abood's* union, can easily be considered a narrow segment of society with common interests and one not representative of the general population.[15] As with the state bar association in *Keller*, there is no evidence that the Alligator Advisory Council was created to participate in the state's general government. And as in *Frame*, the nexus between the trappers and hunters' mandatory fees and the Council's particular message cannot rightfully be characterized as attenuated. There is a close nexus between the alligator producers and the message funded.

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15. The fact that license fees paid by fur (as opposed to alligator) trappers end up in the Education and Marketing Fund does not defeat this reasoning. La.R.S. 56:251; La.R.S. 56:266(D)(1).

10. Because the generic advertising here involved is not government speech, plaintiff is free to challenge such advertising on First Amendment grounds.

First Amendment Claim

11. Constitutional determinations of the alligator marketing program are guided by the Supreme Court's 1997 *Glickman* decision and its 2001 *United Foods* decision. The regulatory scheme in this case more nearly resembles the one considered in *United Foods* rather than the one in *Glickman.*[16] Therefore, because Supreme Court precedent so requires, the DWF's generic advertising, as funded by the Resource Fund and the Education and Marketing Fund through mandatory assessments, amounts to unconstitutional compelled commercial speech. Explanation of why this is so requires a detailed consideration of that precedent.

12. In *Glickman*, the Court held that First Amendment protections were not abridged by various regulations contained in marketing orders promulgated by the Secretary of Agriculture (under the Agricultural

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16. "The distinction between *Glickman* and *United Foods* does not turn on evaluation of the merits of competing policy concerns." *Delano Farms Co. v. California Table Grape Comm'n*, 318 F.3d 895, 899 (9th Cir. 2003). Entitlement to First Amendment protection against state compulsion to fund generic advertising is governed by the challenged statute's similarity to either the one at issue in *Glickman* or to the one at issue in *United Foods*. If more similar to the latter, then the statute is in violation of First Amendment protections. *Id.* at 899-900.

Marketing Agreement Act of 1937) requiring California peach growers, handlers, and processors to pay assessments, from which were paid the cost of generic advertising of California peaches. Though the marketing orders regulated prices and surplus along with the quality, quantity, grade, and size of the commodity, they did not restrain producers from communicating any message to any audience, did not compel engagement in any actual or symbolic speech, and did not compel producers to endorse or to finance any political or ideological views. *Id.* at 469-470.[17] Nevertheless, the Court placed great weight upon the statutory context and its displacement (through the marketing orders) of competition and many aspects of independent business activity characterized by antitrust protection; indeed, the orders were expressly exempted from the antitrust laws. The Court specifically noted that "[t]he business entities that are compelled to fund the generic advertising at issue in this litigation do so as part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme." *Glickman*, 521 U.S. at 469.

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17. The weight placed by the *Glickman* upon respondents' presumed agreement with the advertising message is notable: "since all of the respondents are engaged in the business of marketing California nectarines, plums, and peaches, it is fair to presume that they agree with the central message of the speech that is generated by the generic program." *Glickman*, 521 U.S. at 470. The Court also seemed to assume that the generic advertising was "factually accurate." *Id.* at 474. Here, plaintiff does not agree with the advertising message for an essentially unregulated market of alligator parts and skins.

13. *United Foods* held that the First Amendment prohibits the government from compelling mushroom farmers to pay assessments that were used largely to fund advertisements promoting mushroom sales pursuant to the Mushroom Promotion, Research, and Consumer Information Act. Though the advertising message was that mushrooms are worth consuming whether or not they are branded, a mushroom producer objected to being charged for a message that seemed to be favored by a majority of producers, wanting instead to convey the message that its brand of mushrooms was superior to those grown by other producers. Minor as it may have seemed, the Court found this disagreement to be significant enough to subject the compelled funding to First Amendment scrutiny. *United Foods*, 533 U.S. at 411. When such scrutiny revealed a violation, the Court distinguished *Glickman* on the ground that its program was fundamentally different from the one in *United Foods* in that *Glickman's* mandated assessments were ancillary to a more comprehensive program restricting market autonomy. *Id.* "Beyond the collection and disbursement of advertising funds, *there are no marketing orders that regulate how mushrooms may be produced and sold, no exemption from the antitrust laws, and nothing preventing the individual producers from making their own marketing decisions.*" *Id.* at 412 (emphasis added).

14. Certain commentary enunciated in *United Foods* bears repeating:

> Just as the First Amendment may prevent the government from prohibiting speech, the

> Amendment may prevent the government from compelling individuals to express certain views, or from compelling certain individuals to pay subsidies for speech to which they object. Our precedents concerning compelled contributions to speech provide the beginning point for our analysis. The fact that the speech is in aid of a commercial purpose does not deprive respondent of all First Amendment protection. . . . The subject matter of the speech may be of interest to but a small segment of the population; yet those whose business and livelihood depend in some way upon the product involved no doubt deem First Amendment protection to be just as important for them as it is for other discrete, little noticed groups in a society which values the freedom resulting from speech in all its diverse parts. First Amendment concerns apply here because of the requirement that producers subsidize speech with which they disagree.[18]

United Foods, 533 U.S. at 410-411 (citations omitted). *See also Livestock*, 207 F.Supp.2d at 997-998 ("Like the plaintiffs in *Abood* and *Keller*, the plaintiff cattle producers are compelled to associate. They are required by federal law . . . to pay 'dues,' if you will, to an entity created by federal statute . . . Compelling plaintiffs to make contributions for speech to which they object works an infringement of their constitutional rights").

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18. As noted *supra*, n.2, plaintiff alligator farmer not only "objects" to the generic speech, plaintiff *vehemently* objects.

15. Subsequent to *United Foods*, the Ninth Circuit in January 2003 rendered an opinion that is entirely consistent with this ruling. The court held that assessments imposed on grape producers pursuant to California's Ketchum Act to fund generic advertising violated the First Amendment, reasoning that the assessments were not ancillary to a more comprehensive program that collectivized the industry or imposed an antitrust exemption, and that the advertising itself was the Act's primary object. *Delano Farms Co.*, 318 F.3d 895. Worth noting is the court's recognition that "[c]onstitutional law classes will doubtless enjoy the superficially droll question, 'why does the Constitution prohibit the government from compelling mushroom growers, but allow government to compel nectarine, peach and plum growers, to pay for generic advertising?' " *Id.* at 898.

16. The Louisiana statutory scheme at issue here is different from *Glickman* in a number of ways. Though the Alligator Advisory Council does collect and disburse advertising funds, defendant has not directed the court's attention to any provision suggesting that the statutory scheme displaces competition. The alligator market remains competitive. Indeed, nothing prevents the individual farmers or trappers from making their own marketing, advertising, and branding decisions.[19]

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19. The DWF asserts in its proposed findings of fact that, as a general matter, "Louisiana's statutory scheme (La.R.S. 56:251 *et seq.*) governs the taking of alligators, provides for licenses, defines who may apply for a license, and regulates the tagging, shipping and (Cont'd)

Alligator farmers determine their own standards of quality, and they freely negotiate prices with their customers. The court, therefore, cannot characterize the statutory scheme as a "broad collective enterprise" which constrains an alligator producer's freedom to act. Similarly, the statutory scheme cannot be characterized as one of economic regulation such that mandated participation in an advertising program may be viewed merely as one of any number of cooperative acts or forced association. The alligator industry is also not exempt from the antitrust law of the United States. In short, the Louisiana alligator industry, while regulated, is not *heavily* regulated (at least not as heavily regulated as the peach industry in *Glickman*).

17. Pursuant to the Act at issue in *United Foods*, the Mushroom Council (recipient of the challenged assessment), was authorized to "enter into contracts or agreements for the implementation and carrying out of plans or projects of mushroom promotion, research, consumer information, or industry information, including contracts with producer organizations" and to pay for the associate costs with the assessments. 7 U.S.C. § 6104(e)(1). As overseer of Public Education

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(Cont'd)
labeling of alligator hides. Moreover, the scheme provides for the season for taking alligators and provides for scientific research into the life habits of alligators through technically trained officers and employees." Proposed Findings of Fact and Conclusions of Law, ¶ 8. Nowhere is it claimed that the statutory scheme displaces competition or otherwise prevents alligator farmers from making their own marketing decisions.

and Marketing and Resource Fund revenues, the Alligator Advisory Council's responsibilities are highly similar, especially in light of the enumerated goals of each Fund. La.R.S. 56:266(C); La.R.S. 56:266(B)(1)-(7); La.R.S. 56:279(B)(1)-(5).

18. The advertising at issue here is not ancillary to a more comprehensive program restricting market autonomy which the Court considered to be significant in *United Foods*. As noted *supra*, the DWF is not statutorily authorized to regulate to whom alligator farmers may sell their skins, the manner in which farmers promote and market their skins, or the price at which farmers must sell their skins. Insofar as *United Foods* was concerned with the percentages of assessment money used for generic advertising, it is notable that the jurisprudence does not mandate the presence of hard and fast percentage of total DWF revenue spent on generic advertising. In *Delano Farms*, for example, the court held that in light of *United Foods*, the advertising assessments mandated under state law violated the First Amendment rights of grape producers. In addition to being based upon the lack of either industry collectivization or an antitrust exemption, the court's holding was also based in part on the fact that about 90% of the assessment money was spent on generic promotional activities. In *Livestock*, 50% of the assessments collected and paid to the Beef Board were used for advertising, in *Michigan Pork*, roughly half of the Pork Board's budget went to advertising, marketing, and merchandising, and in *Charter v. United States Department of Agriculture*, 230 F.Supp.2d 1121

(D.Mont. 2002), a "great percentage" of the assessments were used for generic advertising. These cases do not suggest that lower percentages of generic advertising spending will negate the applicability of *United Foods*. Here, the percentages of total revenue spent on alligator-related generic advertising and marketing by the DWF from the Resource Fund are not so paltry as to render *United Foods* inapplicable, especially since the percentages have risen significantly in recent years. The presence of less than average percentages in this case is overcome by the fact that there is no collectivization of the industry and that no antitrust exemption exists. And again, as stated earlier, to trample upon plaintiff's First Amendment rights "just a little bit" does not rectify the fact that those rights are being trampled upon.

19. The Louisiana statutory scheme provides funding from the mandatory assessments upon plaintiff for many useful and productive activities to which plaintiff could not (and does not) object on First Amendment grounds. These activities include law enforcement, research and development of alligator habitat and protection and management of the species—all of which have no doubt contributed to rescuing the alligator from its once near-extinct status. The state's compelled generic advertising program, however, is completely severable from those conservation activities.

20. Plaintiff does not demand a refund of that portion of its prior assessments which have been spent on such generic advertising nor does plaintiff request that assessment and collection of either the tag or license fee be

restrained. Plaintiff demands as relief only that the Secretary of the Louisiana Department of Wildlife and Fisheries be enjoined from "approving, authorizing or expending any money from the Alligator Resource Fund or the Alligator Marketing Fund for the purpose of generic alligator marketing." That relief is available, however, only if the statutory program authorizes the Secretary to continue to collect the assessments and spend them for purposes other than such advertising. The court assumes that both sides agree that the Secretary has such authority. If that assumption is not correct then counsel for plaintiff shall propose a different remedy.

EPILOGUE

The First Amendment provides, in part: "Congress[20] shall make no law . . . abridging the freedom of speech . . ."

The undersigned admits to a certain degree of difficulty in maintaining an appropriately straight judicial face while attempting to apply the Supreme Court precepts that explain the simple language of the First Amendment, to the alligator advertising program at issue here.

When important constitutional issues must be resolved by a determination of whether an alligator is more like a mushroom than a peach, then in the words of Justice Thomas: "[S]urely we have lost our way." *Glickman*, 521 U.S. at 506 (Thomas, J., dissenting).

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20. It is well established the First Amendment applies to the states as well.

Appendix B

CONCLUSION

Accordingly, judgment shall be entered in favor of plaintiff, Pelts & Skins, L.L.C., and against defendant, Secretary of the Louisiana Department of Wildlife and Fisheries and all others covered by Fed.R.Civ.P. Rule 65(d) permanently enjoining them from future approving, authorizing or expending revenues from the Louisiana Fur and Alligator Public Education and Marketing Fund or from the Louisiana Alligator Resource Fund for the purpose of generic alligator marketing. Counsel for plaintiff shall confer with counsel for defendant and submit a proposed effective date for such an injunction, along with a proposed form of judgment.

Baton Rouge, Louisiana, April 24, 2003.

s/ John V. Parker
JOHN V. PARKER
UNITED STATES DISTRICT JUDGE
MIDDLE DISTRICT OF LOUISIANA

APPENDIX C — RELEVANT STATUTES

La.R.S. 56:253 provides in pertinent part:

> C.(1) Every resident fur dealer, trapper, alligator hunter, alligator farmer, nonresident fur dealer, or nonresident alligator hunter before shipping raw furs, alligators, or alligator skins out of the state shall secure from the department, or duly authorized representative thereof, a tag to be attached to the shipment. . . . The . . . alligator hide tag fee for each raw alligator skin to be shipped, used for taxidermy, or tanned shall be no more than four dollars per alligator or raw alligator skin. . . . Revenues received by the state pursuant to this Paragraph shall be distributed as provided in R.S. 56:266 and 279.

La.R.S. 56:266 provides in pertinent part:

> C. The Louisiana Fur and Alligator Advisory Council. Pursuant to R.S. 36:605(B)(2), the secretary shall create the Louisiana Fur and Alligator Advisory Council, which shall be within the Department of Wildlife and Fisheries. The Louisiana Fur and Alligator Advisory Council shall be responsible for reviewing and approving recommended procedures and programs to be funded from the Louisiana Fur and Alligator Public Education and Marketing Fund and the Louisiana Alligator Resource Fund, to ensure that any monies from the funds are expended for the specific goals of the council. This council shall be composed of eleven members of which nine shall be appointed by the secretary. The individuals appointed by the secretary to this council shall

represent a cross section of trappers, alligator hunters, coastal landowners, and alligator farmers as follows: one member of the council shall represent trappers and alligator hunters from north Louisiana; one member shall represent trappers and alligator hunters from southwest Louisiana; one member shall represent trappers and alligator hunters from southeast Louisiana; one member shall represent trappers and alligator hunters statewide; three members shall represent coastal landowners; and two members shall represent the Louisiana Alligator Farmers and Ranchers Association. One member of the council shall be designated by the speaker of the House of Representatives and another member shall be designated by the president of the Senate. These associations may submit, in writing, to the secretary, nominations for these members. The secretary may appoint seven members recommended by the Louisiana Trappers and Alligator Hunters Association and two members recommended by the Louisiana Alligator Farmers and Ranchers Association. The secretary or his designee shall be an ex officio member of said council and shall be present at all official meetings. All members of the council shall serve four-year terms.

. . . .

Appendix C

E. Expenditures. (1) The monies made available by the legislature from the fund as provided in this Section or from any other source shall be used solely for the programs, purposes, and specific goals enumerated in this Section.

. . . .

F. Annual Reports. The Department of Wildlife and Fisheries shall make a written operating report to the legislature at the end of each fiscal year. This report will contain a summary of revenues received, expenditures made, and the status of achievement of specific goals. This report shall be submitted to the House and Senate Committees on Natural Resources by the end of the calendar year.

La.R.S. 56:279 provides in pertinent part:

A. Recognizing that the Louisiana alligator industry is a vital aspect of Louisiana's economic base and that in recent years worldwide markets and prices have expanded at a tremendous rate; and recognizing the rapid expansion of Louisiana alligator farming industry statewide; and recognizing the uniqueness of the state's alligator farming industry, one state agency, the Louisiana Department of Wildlife and Fisheries, has provided the impetus for inception and development of the total alligator conservation program; and recognizing the many beneficial influences that Louisiana's alligator program has had on crocodilian conservation worldwide; and

recognizing world trends questioning the consumptive utilization of wildlife species, and recognizing that those trends, by adversely affecting economic conditions, could have a severe impact on the alligator industry; and recognizing that raw and finished alligator skins and products are largely consumed outside the United States; and recognizing the need to educate the public concerning alligator hunting as a sound wildlife management practice; and recognizing the urgent need to support the alligator industry with a comprehensive research and development program; and recognizing the need to staff and fund the Louisiana Department of Wildlife and Fisheries with adequate personnel in order to service this industry's needs, the Legislature of Louisiana does hereby establish the Louisiana Alligator Resource Fund within the Louisiana Wildlife and Fisheries Conservation Fund. The Alligator Resource Fund is intended to help defray the cost of alligator programs within the fur and refuge division of the Louisiana Department of Wildlife and Fisheries.

B. The specific goals of this Section are:

(1) To provide salaries and financial support including associated indirect cost for the following positions, to provide a minimum of two full-time technical positions (biologists) and eight nontechnical positions such as computer operators, secretaries, and wildlife specialists existing within the fur and

refuge division of the Louisiana Department of Wildlife and Fisheries.

(2) To assist with funding for law enforcement activities associated with the alligator farm industry when surplus funds are available and recommended by the Louisiana Fur and Alligator Council.

(3) To assist with funding marketing programs recommended by the Louisiana Fur and Alligator Advisory Council when surplus funds are available.

(4) To actively fund research on all aspects involved with alligator conservation and to develop the techniques needed to enhance the commercial alligator industry.

(5) To assist in funding management of the alligator population through proper management, harvest, and farm facility management.

C.(1) All revenues received by the state from tag fees imposed on alligator hunters, alligator farmers, alligator shipping label fees on the sale of alligators, and all revenues derived from any other alligator-related fees and from the severance tax on alligator skins provided for in R.S. 56:256 shall be credited by the state treasurer to a special fund designated as the "Louisiana Alligator Resource Fund" after those

revenues have been deposited in the Bond Security and Redemption Fund. Out of the funds remaining in the Bond Security and Redemption Fund after a sufficient amount is allocated from that fund to pay all obligations secured by the full faith and credit of the state that become due and payable within each fiscal year, the treasurer, prior to placing such funds in the state general fund, shall pay into the Louisiana Alligator Resource Fund an amount equal to the revenues generated from collection from those sources provided for in this Section and other sources as provided by law.

. . . .

D.(1) The monies made available by the legislature from the fund as provided in this Section or from any other source shall be used solely for the programs, purposes, and specific goals enumerated in this Section.

(2) The Department of Wildlife and Fisheries shall maintain records of the sources of money received and the purposes therefor, as well as the person or persons to whom money is paid and the purpose therefor. Vouchers or receipts shall be kept for all money paid out. Money appropriated or otherwise made available to the department for authorized purposes shall be withdrawn from the treasury on warrant of the secretary of the department.

Appendix C

(3) The Department of Wildlife and Fisheries in utilizing monies from the fund shall contract, only with the approval of the Louisiana Fur and Alligator Advisory Council, for any services relating to specific goals enumerated in this Section. The secretary is hereby authorized and empowered to carry out any and all contracts entered into in order to achieve these goals.